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## SYMPOSIUM
## INTERSEXIONALITY:
## INTERDISCIPLINARY PERSPECTIVES ON
## QUEERING LEGAL THEORY

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**Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law**

*and the*

**1998 Symposium:**
**InterSEXionality: Interdisciplinary Perspectives on Queering Legal Theory**

# EDITOR'S NOTE

InterSEXionality, the topic of this Fourth Annual Legal Theory Symposium at the University of Denver College of Law, evokes a number of important themes. First, the methodology developed by intersectionality theorists lends itself to application in sexual orientation contexts. Second, working at the crossroads of queer theory and law offers both promise and peril, for it entails applying insights directed at deconstructing sexual identity to a legal analysis that is fundamentally based on identity categories. Third, interSEXionality may elucidate interrelationships among seemingly separate identity categories, such as gender, sex, sexuality, race, class, and sexual orientation. In particular, it questions whether gender subsumes sexual orientation, or vice versa. Exploring these intersections could be described as "queering legal theory."

The interdisciplinary approach taken in this volume includes anthropological, historical, literary, and political science, as well as legal perspectives on sexual orientation theory. Four channels of inquiry organized the symposium: *Constructing Sex, Gender and Sexual Orientation*; *Constructing Heterosexuality*; *Constructing Marginality*; *and Toward InterSEXionality*. The issues raised include who is included (and excluded) in constructions of sex, gender, and sexual orientation, and whether minority sexual orientation and gender identities undermine or buttress the compulsory heterosexuality regime. Additional themes emerge concerning the role of capitalism in constructing gay, lesbian, bisexual, and transgender communities and strategies, and the difficulty of alleviating penalties for feminine behavior without perpetuating traditional gender roles. Julie Nice sets the tone by summarizing the contributions' strategic implications for an antisubordination agenda, while Frank Valdes wraps it up by situating the symposium within the larger discourse of sexual orientation legal theory scholarship and activism.

The *Law Review* thanks the University of Denver College of Law for its unflagging support of the annual legal theory symposium, the Hughes Research and Development Committee for its financial support, the InterSEXionality Symposium participants who brought originality and energy to the discussions, and the faculty of the University of Denver and the University of Colorado at Denver for their invaluable participation in the symposium process. I would especially like to thank University of Denver College of Law Professors Nancy Ehrenreich and Martha Ertman for working so closely with me during the symposium planning; their organizational and intellectual prowess was integral to this symposium's success. Last, but surely not least, I thank Kent Modesitt, the Editor-in-Chief of the 1998-99 *Law Review*, who went above and beyond the call of duty in assisting with the publication of this issue.

*Karla C. Robertson,*
*1997–98 Symposium Editor*

# FOREWORD

# INTERSEXIONALITY AND THE STRATEGY QUESTION

JULIE A. NICE*

This issue of the *Denver University Law Review* is the culmination of the University of Denver College of Law's annual symposium process. One of our most distinctive activities at the College of Law is the Denver symposium. Each year a group of Denver faculty, in collaboration with the *Law Review*, selects a symposium topic which we think raises newly identified or persistently difficult issues throughout law and society. Members of the Denver faculty then meet weekly to discuss readings on the topic along with our "regulars" who have included law review editors[1] and several dedicated interdisciplinary local scholars who schlep to the law school each Friday afternoon.[2] Along the way, we organize a round-table conference to which we invite both new and established interdisciplinary scholars who study the topic. We have been extremely fortunate in past symposia to have enjoyed participation by superb scholars on Unconstitutional Conditions (1995),[3] The New Private Law (1996),[4] and Coercion and Exploitation (1997).[5] This year our good fortune multiplied for our 1998 symposium on InterSEXionality: Interdisciplinary Perspectives on Queering Legal Theory. We enjoyed stimulating presentations and engaging exchanges among our local faculty and our guests, Professors Nan Alamilla Boyd, Patricia Cain, Mary Anne Case, David Cruz, Karen Engle, Katherine Franke, Jean Love, Ana Teresa Ortiz, Jane Schacter, Kendall Thomas, and Francisco Valdes. The contributions collected in this issue represent the written part of this in-

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* Associate Professor of Law, University of Denver College of Law. Thanks to Martha Ertman and Karla Robertson for their suggestions.

1. The Denver model owes much to the students who helped create it, with a particularly high standard set by the editors of our first collaborative faculty-student symposium issues. Lisa Banks, 1995 Symposium Editor, first approached me about her idea of a faculty-student collaboration. For our 1996 issue, Sue Chrisman, Editor-in-Chief, and Tracy Craige, Symposium Editor, regularly attended our reading group. They each provided editorial service above and beyond the call of duty, editing months after they graduated. This year their shoes were ably filled by Symposium Editor Karla Robertson, who expanded our tradition by being the first student selected to contribute a Note on the symposium topic.

2. We are extremely fortunate to enjoy the regular participation of Professor Susan Sterett who teaches political science at the University of Denver and Professor Catherine Kemp who teaches philosophy at the University of Colorado at Denver.

3. Symposium, *The Unconstitutional Conditions Doctrine*, 72 DENV. U. L. REV. 857 (1995).

4. Symposium, *The New Private Law*, 73 DENV. U. L. REV. 991 (1996).

5. Symposium, *Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U. L. REV. 875 (1997).

terdisciplinary dialogue, which focuses primarily on the regulation of sexuality and the intersecting relationships between sexuality and sex, gender, sexual orientation, race, and class.

One broad question emerges from this year's dialogue on Inter-SEXionality,[6] namely, what strategies will best serve to end subordination, whether based on sexuality or other classifications, such as gender, race, or class. The common mission assumed by this question, that of ending subordination, may be subject to challenge. While each of the commentators here might describe his or her interests differently,[7] their perspectives share substantial agreement with that purpose. Considerable disagreement emerged, nonetheless, about the desirability of various strategies aimed at achieving this end. Let me hasten to add that this disagreement was unfailingly friendly. But the persistence of disagreement over strategy calls for further analysis, both to make the best selections of strategy for ending subordination and to create awareness of the method-based fault lines which could fracture the anti-subordination community of scholars. Anti-subordination communities have learned these lessons before. We do not want to leave any stone unturned in our search for the best strategies for ending subordination. Nor do we want to throw sticks or stones at one another when we disagree about those strategies. In these regards, this symposium serves as an excellent model for respectful but challenging probing of fundamental disagreements and their implications for future anti-subordination strategy.

Each contribution proposes or critiques various strategies for countering subordination based on sexuality. I will briefly summarize the articles, which follow in the order they were presented at the symposium.

Leading off, Katherine Franke's article critiques the characterization of particular conduct as sexual.[8] In exploring the concern she shares with

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6. As the Denver reading group planned this symposium, we identified several questions which emerged from literature on the regulation of sexuality: Who is included (and excluded) in constructions of sex, gender, and sexual orientation? If gender is a residual category, as some scholars suggest, what are its boundaries? Can law recognize a queer identity based on a belief system rather than on status or conduct? Do minority sexual orientation and gender identities undermine or buttress the compulsory construction of heterosexuality? Can legal doctrine accommodate the insights of queer theory, which generally eschews essentialism, or are concrete identity categories essential to legal approaches to civil rights and personhood? Can Queer Theory and Critical Race Theory inform each other? How does capitalism inform the creation of gay, lesbian, bisexual, and transgendered communities? The papers collected here address all these questions, and many more.

7. Mary Anne Case, for example, argues convincingly that "[t]he constitutional principle that '[t]here is no caste here' is not cashed out by '[t]here is no subordination' here." Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305, 1315 (1998). Case urges something more than an end to subordination. She offers a reminder that "the Constitution guarantees liberty as well as equality; indeed, the constitutional equality norm itself has regularly been interpreted to guarantee equal liberty." *Id.* at 1316.

8. Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139 (1998).

Michel Foucault that sex not be "legally inscribed on the body,"[9] Franke provides three gripping accounts of "putting sex to work," principally concerning herself with how each practice is marked as sexual and the ways in which this demarcation masks the deployment of sex "as an instrumentality of multiple relations of power."[10] First, she contends that a ritual traditionally practiced by a tribe in Papua New Guinea requiring boys to fellate men so as to ingest semen for masculinization is really not homosexual, but rather a homosocial custom. Second, she argues that the anal penetration of a Haitian immigrant with a toilet plunger by two New York City police officers, if sexual at all, primarily served the interests of race and gender-based torture. Third, she describes the horrific and systematic sexual violence waged against Muslim and Croatian men and women by Serbian soldiers as another example of sex put to work for racial, ethnic, religious, gender-based, and political persecution. Franke endorses the United Nations' prosecutorial model which both recognizes the specifically sexual elements of the assaults without deploying that demarcation to limit recognition of the broader torturous and genocidal natures of these violent acts. With this contribution, Franke moves us beyond the characterization of conduct as sexual toward understanding sex as an instrumentality of other power relations. One wonders whether sex is ever free of such instrumental manipulation.

In her contribution, political scientist Susan Sterett explores the emergence of pension benefits in the late nineteenth and early twentieth centuries, using history to reveal the difficulty of anticipating the effects of any particular strategy.[11] Sterett explains how the development and expansion of pensions for civil war veterans, firemen, and policemen turned on judicial justifications which favored rewarding men who undertook dangerous service to the state and providing charity for their dependent wives and children. While such benefits might be applauded for providing greater financial security for many women, Sterett argues that they reinforced both traditional gender roles for men and women and normative heterosexuality. Through analysis of appellate opinions deciding the constitutionality of government pension spending, Sterett suggests that pension law structured what it meant to be a proper (courageous/masculine) husband and proper (dependent/feminine) wife, and also what it meant to be a proper (heterosexual) family. Like other commentators, Sterett never asserts that either gender roles or heterosexual norms would have been destabilized if the events she studied, the development of pension benefits, had not occurred as they did.

Martha Ertman endorses the use of a traditionally conservative set of tools—market constructs and commercial law—to serve progressive

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9. *Id.* at 1179.

10. *Id.* at 1143.

11. Susan Sterett, *Husbands & Wives, Dangerousness & Dependence: Public Pensions in the 1860s–1920s*, 75 DENV. U. L. REV. 1181 (1998).

ends.[12] In her article, Ertman expands on her strategy of employing commercial law tools as a means to reconstruct marriage. Ertman argues that traditional marriage is a credit relationship in which a primary homemaker extends credit to a primary wage earner in the form of homemaking services and lost opportunity costs. If the marriage endures, the primary wage-earner will discharge the debt by sharing his ideal worker wages with the primary homemaker. If not, Ertman's proposed premarital security agreement will govern, allowing the homemaker/creditor to collect on her loan by using the designated collateral to satisfy the debt. Ertman anticipates how queer legal theory will receive her proposal to commercialize marriage, arguing that commercializing marriage with premarital security agreements will serve the interests of queer theory by revealing the constructed nature of heterosexual marriage, allowing for gender performativity, intervening in conflations of sex, gender, and sexual orientation, and creating space for same-sex marriage. Who can know for sure whether Ertman's commercial tools will reconstruct traditional marriage, or merely ratify it?

Jane Schacter offers commentary on both Martha Ertman's proposal for premarital security agreements and Susan Sterett's historical analysis of pension benefits.[13] Schacter reminds us that particular strategies may, or may not, have their intended effects once they are "received, understood, and shaped in the diffuse, collective social processes that give meanings to these strategies over time."[14] Schacter argues that legal change without cultural change is not likely to alter underlying inequalities, and thus fears that Ertman's proposed premarital security agreements may be more likely to reinforce the gendered status quo of heterosexual marriage given the dominant cultural context that makes marriage nearly compulsory. Schacter notes that Sterett's historical analysis of pension benefits shows how those financial incentives reinforced the gendered status quo. Rather than risk reinforcement of marriage and all that it entails, Schacter urges us to think more deliberately about how best to achieve "a genuine pluralism of affiliative structures."[15] While Schacter carefully articulates her well grounded fears, she claims no easy method for determining when a strategy is likely to do more good than harm.

Karen Engle focuses directly on strategy, criticizing that used by gay rights proponents to counter their opponents' charge that gay rights are special rights.[16] Engle first differentiates the meanings of special

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12. Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998).

13. Jane S. Schacter, *Taking the InterSEXional Imperative Seriously: Sexual Orientation and Marriage Reform*, 75 DENV. U. L. REV. 1255 (1998).

14. *Id.* at 1256.

15. *Id.* at 1259; *see also id.* at 1264.

16. Karen Engle, *What's So Special About Special Rights?*, 75 DENV. U. L. REV. 1265 (1998).

rights as used by gay rights opponents, noting their general conflation of civil rights and special rights. She then criticizes gay rights proponents generally for not adequately responding to special rights critics, and specifically for perpetuating a negative view of civil and special rights. Engle relies on Holmes's definition of special rights as those legal consequences attached to a group based on the special facts which uniquely make up the group. Calling for gay rights advocates to argue for special rights because the "facts" call for them,[17] Engle thus provocatively employs a formalist distinction between fact and law to argue against gay rights proponents' "very liberal (read conservative) understanding of civil rights."[18] The question remains whether this formalist tool can serve Engle's progressive ends.

Mary Anne Case continues to defy queer theory fashions by openly wearing the liberal label and urging strategies aimed at achieving "liberal individualism and universalism."[19] Her article responds to Frank Valdes's use of the berdache as a model of successful disaggregation of sex from gender.[20] Case makes the point that, although the berdache depart from norms requiring alignment of male sex and gender by being biologically sexed male and socially gendered feminine, they still occupy a separate sphere in Native American culture. Even if their separate sphere enjoys a purportedly equal status, she argues that the berdache still reify the separate categories of masculinity and femininity and enforce a gendered package, albeit a different one. Case compares the separate sphere enjoyed by the berdache to that afforded their counterparts in the documentary movie *Paris is Burning*, the novel and movie *Midnight in the Garden of Good and Evil*, and the play and movie *Tea and Sympathy*. Because creating separate spheres based on any distinctions between sex and gender perpetuates the dangers of castes, Case urges discarding any distinction between sex and gender, much as the distinction between "noble" and "base" was discarded. As she urges unpacking all package deals, Case leaves you wondering whether any ties bind traits within a person or among people.

Patricia Cain explicitly employs the feminist consciousness raising method to better understand transsexual people, sharing some of her own experiences as a lesbian and retelling the stories of several female-to-male (FTM) individuals as well as those of people who are intersexed (meaning that they combine both male and female biological traits) or are intergendered (meaning that they combine both feminine and mascu-

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17. *Id.* at 1266–67, 1302–03.

18. *Id.* at 1302.

19. Case, *supra* note 7, at 1319.

20. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

line traits).[21] Cain's stories bridge the gap of understanding between lesbian women and FTM individuals, serving as a model for continuing exploration of the experiences of people who are sex or gender minorities. On a doctrinal level, Cain suggests a strategy for incorporating sex and gender minorities into existing legal protections by reconceptualizing anti-discrimination jurisprudence. No doubt, telling the little known stories of marginalized sex and gender minorities is an important first step.

In her paper, historian Nan Alamilla Boyd explores the queer community's focus on visibility politics as its primary means of achieving civil rights.[22] Boyd "challenges the liberal equation that visibility realized through mainstream marketplace accommodation equals or reflects enhanced political strength for queers."[23] She cites the recent rise of advertising targeting gay and lesbian consumers as enhancing mainstream visibility, but suggests that this neither reflects nor creates increased hope of legitimacy or civic recognition. She then juxtaposes the experiences of the Tavern Guild of San Francisco in the 1950s and 1960s, showing how a marketplace activity successfully transformed one gay bar subculture into a social movement for the primary purpose of protecting the bars from police harassment, though never becoming mainstream. After exploring both disadvantages of mainstream visibility and alternatives to visibility politics, Boyd concludes that some queer marketplace activity holds the presumably greater promise of encouraging queers to be subversive rather than to assimilate. Boyd does not predict that more subversive activity will lead to enhanced civil rights for queer people. Somehow one doubts that is her only goal.

Karla Robertson's Note focuses on deconstructing marriage by using bisexual orientation as the lens through which to view the legal regulation of marriage.[24] Because Congress and the courts allow people of bisexual orientation to legally marry opposite sex spouses, Robertson argues that neither heterosexual orientation nor even love or companionship is necessary, or even very relevant, to be eligible to legally marry. Through her analysis of cases and statutes, Robertson instead reveals that family law treats the spouses' capacities for penis-vagina penetration as the determinative criterion for validation of marriage. In doing so, Robertson reveals that the many legal, financial, and social benefits attached to marriage are conditioned on the capacity to engage in this specific sexual conduct. While Robertson exposes an enormous gap between the romanticized rhetoric surrounding marriage and the actual sexual test for

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21. Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321 (1998).

22. Nan Alamilla Boyd, *Shopping for Rights: Gays, Lesbians, and Visibility Politics*, 75 DENV. U. L. REV. 1361 (1998).

23. *Id.* at 1362.

24. Karla C. Robertson, Note, *Penetrating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory*, 75 DENV. U. L. REV. 1375 (1998).

marital fitness imposed by family law, she leaves open the question of the best strategy for closing the marital gap.

As these papers demonstrate, the strategy question is open to debate among scholars who study the regulation of sexuality. At the broadest level, the pieces address how we can best reconstruct law and society so that they honor both equality and liberty, sexual and otherwise. More specifically, they engage a number of elements of the strategy question. For example, should we seek to mark sexuality, as well as sex, gender, sexual orientation, race, class, and the like? While many scholars are busily marking previously unmarked sexuality, Franke urges caution, particularly when the sexual label masks enforcement of other oppressive norms, such as those based on race, ethnicity, gender, or religion. Yet Cain forges ahead with the marking project, telling and seeking to understand the stories of sex and gender minorities as instances of sex discrimination.

What models should we follow to transcend the limitations of norms related to sexuality, sex, gender, sexual orientation, race, class, and the like? Valdes previously offered a model of the berdache for our study and emulation. Case argues that such a package model of different sex and gender combinations will perpetuate existing categories and castes.

What about the sameness/difference debate? Are civil rights for gay people special or not? Proponents argued that gay rights are not special, but Engle thinks they erred and should argue instead that the special facts of anti-gay discrimination justify special rights.

Can traditionally conservative tools be used for progressive ends? Case urges adoption of liberal means and ends, while Engle refers to one liberal conception of civil rights as conservative. Yet Engle also employs a formalist distinction between fact and law to justify special rights for gay people. Also, Ertman employs tools of the commercial market to reconstruct marriage. Yet Sterett's pension example and Schacter's analysis urge caution, both about whether these tools are likely to reconstruct marriage, and whether marriage perhaps should be deconstructed instead of reconstructed. On the market question, Boyd weighs in somewhat ambivalently, endorsing market activity, but only for purposes of subversion, not assimilation. On the marriage question, Robertson focuses on deconstruction, but leaves open the possibility of reconstruction.

Should scholars concern themselves with the strategy question? For an impassioned answer to this question, read Frank Valdes's Afterword.[25] Valdes offers a tour of the history and contemporary challenges of queer legal theory, exhorting social justice scholars to a multidimensional dis-

25. Francisco Valdes, *Afterword: Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship, or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409 (1998).

course that leaves out no experience in constructing both the details and the larger mosaic of human sexuality.

In addition to providing insights on the strategy question, the participants in this Denver symposium employ a variety of tools for deconstructing or reconstructing sexuality and its legal regulation. While some focus on understanding the experiences of a particular *class* of people, such as Engle on gays and lesbians and Cain on transsexuals, others emphasize *classifications*, such as Case's ongoing deconstruction of gender. Various commentators explore the *intersectional* relationships between one classification and others, such as Franke's exploration of sex and gender, race, etc. Whereas some follow an *inter-doctrinal* approach, such as Ertman's incorporation of commercial law into family law, others use *interdisciplinary* approaches, especially Boyd's and Sterett's uses of history. These examples do not exhaust the approaches used by any of the contributors, most of whom wield multiple tools to challenge or subvert the legal status quo. By contesting fundamental presumptions about classes of people, classifications of traits, and intersections among these classes and classifications, as well as by questioning the validity of any categorization, all of these approaches "queer" legal theory.[26]

Sexuality is a rich and complex part of the human experience. As our symposium participants discovered, its study certainly provides for a lively discourse. The contributions collected here offer a little of everything for the scholarly connoisseur, from Boyd's bar culture, Cain's transsexual stories, Case's movies, Engle's legal texts, Ertman's interdoctrinal borrowing, Franke's globe-trotting, Robertson's sexual descriptions, Schacter's caution, Sterett's history, to Valdes's passion. Our hope is that you will read them with a mind both open to understanding new ideas and eager to challenge them in the dialogue that moves forward in this fourth annual Denver symposium.

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26. For a further discussion of queering legal theory, see Ertman, *supra* note 12, at 1240–42.

# PUTTING SEX TO WORK

KATHERINE M. FRANKE*

## I. INTRODUCTION

When I was living in New Haven a number of years ago, a miracle happened that drew people by the thousands to witness evidence of the Divine. A crucifix had been found to appear in the body of an oak tree in the middle of Worchester Square. I went—after all, how often do you get to see that kind of thing? Not surprisingly, at first I couldn't see anything but the usual trunk and limbs of a tree. Yet a believer took the time to show me what was *really* there, something that my untrained eye could not at first see: the cross upon which Jesus Christ had been crucified. Well, maybe there was something there.[1]

To the believers, the shape of the oak tree was evidence of something that was really there—a corporeal manifestation of an omnipresent Divine Being. For them, once you've seen the crucifix, you really can't not see it, you can't un-see it.

For most people, sex is like the Divine Being: It is an obscure and powerful domain that reveals itself in expected and unexpected places, and which is immediately visible to the trained eye. Indeed, once you see it, it's hard to look away. Like the tree in Worchester Square, the human body is an "inscribed surface"[2] which is discursively marked in such a way that renders certain body parts and particular behaviors essentially sexual.

What are we seeing when we recognize something as sexual? How do we know what makes a practice sexual in nature? That is, how do we distinguish a practice which is fundamentally sexual from one which is

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* Associate Professor of Law, Fordham University School of Law. I presented an earlier version of this article at the University of Denver College of Law symposium on InterSEXionality in February 1998. Many thanks to the participants in that conference, as well as to Ana Ortiz, Tracy Higgins, Kendall Thomas, Robin West, and Renée Römkens for challenging conversations about the issues I raise in this piece. The students in my Feminist and Critical Race Theory workshop also provided valuable comments on an earlier draft. My gratitude to Emily Alexander who provided superb research assistance on this project.

1. The Blessed Virgin Mary seems to appear all the time in Queens. In fact, there are ads in the subway announcing a phone number you can call, for only $1.50 a minute, to receive information about the most recent sightings of the BVM. Of course, I have always wondered, why Queens of all places? Carol Rose recently answered this question for me: Lots of Catholics, of course.

2. MICHEL FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 148 (Donald F. Bouchard ed. & Donald F. Bouchard & Sherry Simon trans., 1977) [hereinafter FOUCAULT, LANGUAGE].

not? I ask these questions in order to beg two more normative questions: Why do we do so, and what happens to what we "know" once we have done so? My curiosity derives from a concern that to call something sexual is at once to say too much and not enough about the meaning of a practice so named.

When men in a workplace make life intolerable for their female coworkers by calling them sexual names, putting up pictures of naked women, and touching their breasts and behinds, their conduct—unwelcome conduct of a sexual nature—is legally described as sexual harassment. When a group of male police officers viciously assault a man in their custody by shoving a toilet plunger up his anus, those cops are charged with aggravated sexual abuse. When an adult male forces a ten-year-old boy to fellate him, this man is arrested for having sexually molested a minor. These offenses receive special legal regulation by our civil and criminal laws as sexual misconduct. Yet the use of excessive violence when placing handcuffs on a suspect, the aggressive use of choke-holds, or chaining a stranger to a pipe in the basement—whatever crimes these are, they are not sex crimes.

By focusing, often exclusively, on what we regard to be the sexual aspect of conduct of this kind, we tend to ignore or eclipse the ways in which sex operates "as an especially dense transfer point for relations of power"[3]—often gender, race, or sexual orientation-based power. For a complex set of reasons, we almost intuitively label some behavior as sexual—take workplace sexual harassment for instance. Yet, if pressed, most people would not be able to either identify or defend a set of criteria they apply in such nominalist moments. To uncover a satisfactory and stable definition of sex is, to borrow an expression from Abraham Lincoln, like undertaking to shovel fleas: "You take up a shovelful, but before you can dump them anywhere they are gone."[4] It is the initial regulatory move, the marking of behavior as fundamentally sexual, that I want to interrogate. If it is in fact true that "there is not some ahistorical *Stoff* of sexuality, some sexual charge that can be simply added to a social relationship to 'sexualize' it in a constant and predictable direction, or that splits off from it unchanged,"[5] then it is worth asking what we are doing and what we are missing when we assume that such *Stoff* exists.

The questions I ask directly here are ones I first considered in my earlier work on sexual harassment. In *What's Wrong With Sexual Harassment?*, I explored how workplace sexual harassment could be a spe-

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3. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 103 (Robert Hurley trans., Vintage Books 1990) (1976) [hereinafter FOUCAULT, THE HISTORY OF SEXUALITY].

4. DAVID HERBERT DONALD, LINCOLN 389 (1995). To be sure, in using this phrase, Lincoln was not referring to sex but to the difficulty he was having in filling out the ranks of the Union Army in 1862.

5. EVE KOSOFSKY SEDGWICK, BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE 6 (1985).

cies of sex discrimination.[6] I criticized both courts and commentators who identified the wrong of sexual harassment to lie in the sexual nature of the conduct.[7] Rather, I argued, sexual harassment must be understood as a technology of sexism, that is, as a tool or instrument of gender regulation which feminizes women as sexual objects and masculinizes men as sexual subjects.[8]

In this article, I will push these insights about the use of sex as a technology of sexism one step further by probing two more fundamental questions: first, why certain practices get labeled as sexual, and second, what flows from their being so designated. I will explore the ostensibly denotative practice of naming particular behavior as primarily sexual in nature by examining two contexts in which the label "sexual," understood as erotic, occludes the way in which sex mediates other social relations of power. In each setting, I argue that we make a grave mistake when we interpret certain behavior as primarily erotic in nature. This mistake, I will argue, is amplified in the legal treatment of these practices as sex crimes, or sexual offenses. In Part II, I will look to ritualized practices in the Highlands of Papua New Guinea where boys as young as seven are forced to fellate older men for a period of up to eight years as part of the process of becoming a man. At first impression, most non-native interpreters of ritualized man/boy fellatio conclude, without hesitation, that this conduct is fundamentally erotic in nature[9]—how can it not be so? In fact, Western anthropological readings of these practices first described them as sodomy,[10] while today the behavior is most commonly referred to as ritualized or institutionalized homosexuality.[11] I will provide an alternative reading of the ritualized semen practices of the Sambia that illustrates the way in which ingestion of semen is undertaken primarily in the service of teaching and reinforcing the cultural power and supremacy of both men and masculinity, while at the same time teaching and reinforcing the cultural subordinancy and inferiority of women and femininity. In this regard, semen practices play a role in Sambia culture similar to that played by workplace sexual harassment in ours.

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6. *See* Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

7. *Id.* at 730–47.

8. *Id.* at 762–72.

9. *See infra* notes 49–59 and accompanying text.

10. *See, e.g.*, F.E. WILLIAMS, PAPUANS OF THE TRANS-FLY 158 (1936).

11. *See, e.g.*, GILBERT H. HERDT, GUARDIANS OF THE FLUTES 1 (1981) [hereinafter HERDT, GUARDIANS OF THE FLUTES] ("Why should a society of manly warriors believe that a boy must be orally inseminated to become masculine? What happens when this conviction is implemented through prolonged ritualized homosexuality?"); Gilbert H. Herdt, *Ritualized Homosexual Behavior in the Male Cults of Melanesia, 1862–1983: An Introduction*, *in* RITUALIZED HOMOSEXUALITY IN MELANESIA 1 (Gilbert H. Herdt ed., 1984) [hereinafter Herdt, *Ritualized Homosexual Behavior*]; Gerald W. Creed, *Sexual Subordination: Institutionalized Homosexuality and Social Control in Melanesia*, 23 ETHNOLOGY 157, 158 (1984).

Next, in Part III, I examine the assault of Abner Louima, a black man who was attacked by white New York City police officers in August 1997. Louima sustained serious injuries after several police officers severely beat him, then forced the wooden handle of a toilet plunger into his rectum, and then removed it and forced the soiled handle into Louima's mouth.[12] The sexual nature of the police conduct animated much of the outrage expressed by the public, the press and legal authorities in the weeks following the assault. Prosecutors initially charged the white police officers arrested in connection with the assault of Louima with sex crimes.[13] Two aspects of this case are worthy of examination. First, why should we consider this assault to be a sex crime? Secondly, by reading the assault as being primarily sexual, important insights about the way that sex is used as an instrument of gender- and race-based humiliation and injury are elided or at least minimized.

Do these examples instruct that we best desexualize crimes like rape and forced sex with children? There are compelling arguments in favor of such a reformation of the laws regulating behavior traditionally treated as sex crimes. Indeed, Michel Foucault made such an argument in the mid-1970s.[14] Surely, the problems that inhere in the project of differentiating sexual assault from a punch in the face suggest that one should give serious consideration to the position that "there is no difference, in principle, between sticking one's fist into someone's face or one's penis into their sex."[15] Ultimately, however, I reject such a wholesale move given that the material experience of sexual assault by its victims instructs that "they cannot afford to jump into the realm of the ideal and pretend that . . . sex (the genitals) is the same as other parts of the body."[16] Rather, I suggest a solution more retail in nature drawn from the experience of the prosecution of sex-related violence by the International Criminal Tribunal for the Former Yugoslavia. The Tribunal has exercised jurisdiction over the individual and mass rapes and sexual assaults of women and men in the former Yugoslavia as violations of international humanitarian law. Due in part to the provisions of international law within the enforcement authority of the Tribunal, as well as to the way in which sex-related violence was used to torture, humiliate, and degrade civilians in Bosnia, the Tribunal has chosen not to focus exclusively upon the sexual nature of these crimes.[17] Instead, it treats sex-

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12. *E.g.*, Merrill Goozner, *NYC Cut in Crime Has a Brutish Side*, CHI. TRIB., Aug. 16, 1997, at 1.

13. *See id.*

14. *See* discussion *infra* Part IV.

15. MICHEL FOUCAULT, POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984, at 200 (Lawrence D. Kritzman ed. & Alan Sheridan et al. trans., 1988) [hereinafter FOUCAULT, POLITICS].

16. Vikki Bell, *"Beyond the 'Thorny Question'": Feminism, Foucault and the Desexualisation of Rape*, 19 INT'L J. SOC. L. 83, 89 (1991).

17. *See* discussion *infra* Part V.

related violence as the *actus reus* of torture, genocide, and crimes against humanity. Thus, the Tribunal prosecutors have the ability, on a case-by-case basis, to fashion their arguments in such a way that highlights the gendered nature of these crimes, where appropriate, without perpetuating the essentialization of certain body parts and human behaviors as fundamentally sexual. In this way, the Prosecutor has resisted the pull to characterize the wrong of these violent acts as predominantly sexual in nature, but rather, has demonstrated how sex can be used as a tool in the service of race, ethnicity, or religion-based war crimes.

Through these examples, I hope to illustrate the productivity of sex; that is, how sex gets put to work in the service of myriad power relations. Sometimes sex is used to satisfy erotic desire. Sometimes sex accomplishes reproduction. Sometimes it does both. But, as Robin West recently pointed out to me in conversations about this topic, "much reproductive hetero-sex is non-erotic." Sometimes sex pays the rent. Sometimes it sells cars, cigarettes, alcohol, or vacations in Mexico. Sometimes sex is used to subordinate, or has the effect of subordinating, another person on the basis of gender or race, or both.

To understand sex as a fundamentally erotic drive, and as a "natural given which power tries to hold in check [e.g., the prosecution of sex crimes], or as an obscure domain which knowledge tries gradually to uncover"[18] (e.g., anthropological discoveries of primitive homosexuality), is to risk two grave errors. First, once something is classified as sexual we understand its meaning primarily in erotic terms and lose sight of the ways in which sex is easily deployed as an instrumentality of multiple relations of power. Second, we are likely to understand the erotic to be present in too few human behaviors insofar as we deny or ignore the role of the erotic in behavior less susceptible to being read as "sexual."

## II. SEMINAL/SEXUAL PRACTICES

In *Guardians of the Flutes*,[19] anthropologist Gilbert Herdt provided an initial monograph of what he terms "ritualized homosexuality" among the Sambia, a tribe in the Eastern Highlands of Papua New Guinea.[20] For the Sambia, the process of becoming a man is not one that may be left to nature, as is the case with girls, but must be accomplished by the ritualized intervention of culture.[21] Thus, beginning at around age seven, boys

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18. FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3, at 105.

19. HERDT, GUARDIANS OF THE FLUTES, *supra* note 11.

20. Herdt provides the name "Sambia" as a pseudonym for the tribe's true name, in order to "protect the identities of those who trusted [him] and to guard the community's ritual cult, which still remains a secretive way of life in the strict sense of the term. Sambia men explicitly stipulated that no part of [his] original material be allowed to circulate within Papua New Guinea." *Id.* at xvi.

21. Herdt summarized the Sambia beliefs as follows:

> Femininity is thought to be an inherent development in a girl's continuous association with her mother. Masculinity, on the other hand, is not an intrinsic result of maleness; it is an achievement distinct from the mere endowment of male genitals. Masculine

commence a process of ritualized masculinization that is completed only when a young man fathers a child.[22] This process begins with a series of ritualized practices designed to purge the polluting and feminizing effects of contact with women from the male body. Herdt terms these "egestive rites" designed to "remove internal, essentially 'foreign' material believed acquired through intimate, prolonged contact with one's mother (and other females)."[23]

Boys are first required to undergo cane-swallowing,[24] whereby canes are forced down their throats so as to induce vomiting and defecation, thereby purging food belonging to the mother from the male body—a necessary prerequisite for masculinization.[25] Secondly, nose-bleeding is undertaken to remove the pollution of menstrual blood remaining in the male body. Stiff, sharp grasses are thrust into the boy's nose until blood flows, thereby removing the "bad blood" from his body.[26] It is a matter of "urgent concern that the mother's contaminated blood be removed from boys; otherwise male biological development is impeded."[27] Men alone conduct these rituals, keeping them hidden from women in the community; to effectuate this, the boys are sworn to secrecy.[28]

Next follow the "ingestive rites";[29] this is where all the attention is paid by those intrigued by the practices of this culture. "The most important early ingestive rite of all," according to Herdt, is that of fellatio.[30] Sambia men believe that without the daily ingestion of semen, a boy's body will not mature into that of a man, and he may likely wither and die.[31] Thus,

> [r]epeated inseminations create a pool of maleness: the boy, it is believed, gradually acquires a reservoir of sperm inside his semen organ. . . . The semen organ changes from being dry and hard to fleshy, moist, and then firm. . . . Semen gradually transforms the initiate's body too. It internally strengthens his bones and builds muscles.[32]

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reproductive maturity must be artificially induced, by means of strict adherence to ritual techniques.

*Id.* at 160.

22. *Id.* at 204–05.

23. *Id.* at 223.

24. Herdt observes that cane-swallowing was abandoned sometime around 1964 because it was too painful. *See id.* at 223 & n.29.

25. *See id.* at 224.

26. *Id.* at 224–25.

27. *Id.* at 226.

28. *Id.* at 262–65.

29. "Ingestive rites" involve the practice of swallowing and absorbing substances believed essential in effectuating masculine growth. *See id.* at 227.

30. *Id.* at 232.

31. *Id.* at 234.

32. *Id.* at 236.

According to these beliefs, boys must avoid all interaction with women, including their mothers, and must fellate older men on a daily basis until they reach adolescence, about the age of fifteen, at which time they switch roles and are fellated by younger boys.[33] These bachelors, as Herdt calls them, are fellated by initiates until the woman they marry begins menstruation.[34] At that point, Sambia culture dictates that they cease same-sex seminal practices and engage only in heterosexual coitus.[35] Again, males closely hold these ingestive rites as secret; indeed, the men threaten the boys with death should they reveal any of this information to women.[36]

Thus you have what Herdt describes as "ritualized homosexuality." Herdt is careful not to describe the Sambia as homosexual.[37] In fact, it is the distinction between homosexual practices and homosexual identity that constitutes the central conundrum of Sambia culture for Herdt. How is it that "[s]even-to-ten-year-old Sambia boys are taken from their mothers when first initiated into the male cult, and thereafter experience the most powerful and seductive homosexual fellatio activities," yet "they emerge as competent, exclusively heterosexual adults, not homosexuals"?[38] The boys "experience [ritualized fellatio] as pleasurable and erotically exciting. Yet, in spite of this formidable background, the final outcome is exclusive heterosexuality . . . ."[39] It is precisely because "homosexual behavior" amongst the Sambia men can be explained neither by genetic determinism nor social learning theory, that Herdt finds the Sambia so fascinating.[40] According to what theory of sexual identity acquisition can "normal" adult heterosexuality evolve out of ritualized childhood same-sex sex?

Initial accounts of Sambia culture by Western anthropologists simply failed to mention the same-sex seminal practices described above.[41] Herdt, among other anthropologists, attributed this omission to a larger refusal within anthropology to regard sexuality as a legitimate subject of ethnographic inquiry.[42] In Papua New Guinea, this oversight quickly

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33. *Id.* at 252; *see also id.* at 281–82 (noting an interim stage when boys approaching puberty take an active role in motivating younger boys to join them as fellators).

34. *Id.* at 252.

35. *Id.*

36. *Id.* at 233.

37. *See id.* at 3 n.2 ("It is crucial that we distinguish from the start between homosexual *identity* and *behavior*.").

38. *Id.* at 2–3.

39. *Id.*

40. *See id.* at 8.

41. *See* Herdt, *Ritualized Homosexual Behavior*, *supra* note 11, at 2 (citing a number of early Melanesian studies that ignored same-sex seminal practices).

42. *See id.* at 3 (recognizing that, as of 1984, "sex remains one of the 'taboo' subjects in anthropology"); Kath Weston, *Lesbian/Gay Studies in the House of Anthropology*, 22 ANN. REV. ANTHROPOLOGY 339, 339 (1993) ("Throughout the first half of the century, most allusions by anthropologists to homosexual behavior remained as veiled in ambiguity and as couched in judgment as were references to homosexuality in the dominant discourse of the surrounding

yielded to revulsion and condemnation by Western anthropologists, accompanied by aggressive efforts by missionaries to dissuade the locals from such perversion.[43] Indeed, many of the practices Herdt observed in his early field work no longer persist in Sambia culture.[44] Herdt, however, was one of the first Western observers to encounter the Sambia practices and declare: Look, homosexuality. Hallelujah, we are everywhere! Thus, with *The Guardians of the Flutes*,[45] his edited collections,[46] and subsequent writings on the Sambia,[47] Herdt has "established a framework for the study of homosexualities cross-culturally."[48] Through the scientific lens of anthropology, Herdt has, therefore, undertaken the task of shedding light upon the "obscure domain" of the homo-sex drive in New Guinea.

From virtually all vantage points, commentators have interpreted Sambia semen practices as both erotic and homosexual, that is, as homoerotic.[49] How could one deny the sexual nature of fellatio? Or the homoerotic nature of fellatio between men? It is this way of knowing these practices that I want to contest. From the perspective of the fellated, fellatio involves arousal, penile erection, ejaculation—surely this practice is about the bachelors "getting off." Herdt's field work documents the fact that the bachelors truly enjoy and seek out sex with boys.[50] Similarly, the boys seem to enjoy, to varying degrees, their "erotic relationships" with

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society."). Herdt attributed three additional factors to this failure: (1) a lack of data; (2) "the tendency for writers still to view homosexual behavior as universally deviant, unnatural, or perverse;" and (3) the use of authorities viewing only heterosexuality as "normal." Herdt, *Ritualized Homosexual Behavior*, *supra* note 11, at 3.

43. *See* Gilbert Herdt, *Representations of Homosexuality: An Essay on Cultural Ontology and Historical Comparison Part II*, 1 J. HIST. SEXUALITY 603, 607 (1991) [hereinafter Herdt, *Representations of Homosexuality*] (addressing the negative response of white missionaries, government officers, and Western agents to the "boy-inseminating man").

44. *See id.* at 607–08 (1991). One must wonder how Herdt's published work may have contributed to the extinction of the very practices he set out to document.

45. HERDT, GUARDIANS OF THE FLUTES, *supra* note 11.

46. RITUALIZED HOMOSEXUALITY IN MELANESIA, *supra* note 11 (collection of articles addressing same-sex sexual practices within different societies in the South Pacific region); RITUALS OF MANHOOD: MALE INITIATION IN PAPUA NEW GUINEA (Gilbert Herdt ed., 1982) (analyzing male maturation rites in Papua New Guinea).

47. GILBERT HERDT, SAME SEX, DIFFERENT CULTURES: GAYS AND LESBIANS ACROSS CULTURES 81–88, 112–23 (1997) [hereinafter HERDT, SAME SEX, DIFFERENT CULTURES].

48. Deborah A. Elliston, *Erotic Anthropology: "Ritualized Homosexuality" in Melanesia and Beyond*, 22 AM. ETHNOLOGIST 848, 848 (1995).

49. *See, e.g.*, Herdt, *Representations of Homosexuality*, *supra* note 43, at 606–07.

50. Herdt observes: "[M]en are not simply biding time by fooling around with initiates. Boys were their first erotic partners. For this reason, and other personality factors, bachelors are sometimes passionately fond of particular boys." HERDT, GUARDIANS OF THE FLUTES, *supra* note 11, at 288.

the bachelors.[51] For this reason, Herdt is willing to characterize some of these unions as "lover relationships."[52]

Herdt finds Sambia culture an interesting subject of ethnographic study because of its exotic manifestation of the erotic, while others would, no doubt, be aghast at the way in which adult men sexually exploit young boys. The ritualized nature of the practice merely compounds the sexual violation. Just as I have cautioned against understanding workplace sexual harassment as a fundamentally sexual activity,[53] so too there is danger in interpreting Sambia semen practices as fundamentally erotic. Deborah Elliston has argued that "[t]o identify the man-boy 'homosexual' practices as 'ritualized homosexuality' imputes a Western model of sexuality to these Melanesian practices, one that relies on Western ideas about gender, erotics, and personhood, and that ultimately obscures the meanings that hold for these practices in Melanesia."[54]

Among the interesting questions to be posed in analyzing semen practices among the Sambia are those regarding the purpose of these practices. Is the fellatio undertaken in the service of satisfying individual erotic desire, or in the service of advancing broader cultural norms which have, no doubt, a sexual component? Herdt poses this question,[55] and ultimately determines to maintain the centrality of the erotic in his interpretation of Sambia initiation rituals.[56] He expresses concern about ethnographies that tend to "ignore, dismiss, trivialize, or even invalidate the actor's homoerotic meanings and desires."[57] He is determined not to "deodorize the erotic and peripheralize the homoerotic ontology."[58] Herdt is not alone in this concern. Gerald Creed, while expressing some criticisms with respect to Herdt's interpretations of Sambia culture, echoes a commitment to keep a focus on the erotic: "[T]he actual physical and erotic aspects of homosexuality . . . are often overlooked when it is treated as institutionalized behavior. Institutionalized homosexuality is still sex and it may still serve a pleasurable function. Analyses that neglect this fact are incomplete."[59]

It is exactly this "homoerotic ontology" that concerns me. Why should we assume that the central meaning of Sambia initiation practices

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51. *See id.* at 282, 319; Herdt, *Representations of Homosexuality*, *supra* note 43, at 611 (discussing the protections and bonds that may develop between bachelors and boys).

52. Herdt, *Representations of Homosexuality*, *supra* note 43, at 611.

53. *See* Franke, *supra* note 6, at 729–47.

54. Elliston, *supra* note 48, at 849.

55. *See* Herdt, *Representations of Homosexuality*, *supra* note 43, at 603 ("[D]o boy-inseminating relationships, one must wonder, express erotic desire?").

56. Herdt recognizes and rejects two interpretative trends which largely dismiss the erotic nature of Melanesian homosexuality. The first trend treats such practices as "purely customary ritual practice." *Id.* at 606. The second approach acknowledges the erotic element, but interprets it as a form of bisexuality. *Id.* at 607.

57. *Id.* at 606–07.

58. *Id.* at 607.

59. Creed, *supra* note 11, at 160.

is sexual, that is, erotic? To ask this question thoughtfully requires the category "sexual" to be broken down into constitutive parts. To describe the semen practices as homoerotic, as Herdt and Creed insist, is to collapse several important concepts that deserve disaggregation. For Herdt, one must understand the male erection as the product of arousal, and arousal must be defined in erotic terms.[60] Yet men can become aroused such that they achieve penile erections for a spectrum of reasons independent of an erotic response to another person or situation.[61] It has been well documented that men can have erections associated with non-sexual fear, sleep, full bladders, violence, and power.[62] Alfred Kinsey observed that for boys, erection and ejaculation are easily induced by "non-sexual" sources such as carnival rides, fast bicycle rides, sitting in warm sand, setting a field afire, war motion pictures, being chased by police, hearing the national anthem, and my personal favorite, seeing one's name in print.[63] Kinsey concluded, however, that by the late teens males have been conditioned to respond primarily to "direct physical stimulation of the genitalia, or to psychic situations that are specifically sexual."[64] Notwithstanding this general conditioning, "a romantic context is not a necessary condition for sexual arousal, in either men or women."[65]

Therefore, there is reason to question interpretive strategies that tend to essentialize certain bodily responses, such as the male erection, as fundamentally erotic or romantic in nature. To the extent that "Herdt posits a tautologous ordering of eroticism that makes penile erection contingent on a kind of arousal that is by definition erotic,"[66] he is making just this mistake in interpreting Sambia culture.

Similarly, I want to resist the inclination to essentialize certain sexual practices as undertaken principally to satisfy erotic desire. Of course,

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60. *See* Herdt, *Representations of Homosexuality*, *supra* note 43, at 613 ("It is a necessary redundancy to say that without sexual excitement—as signified by erections in the inspirer and bawdy enthusiasm in the inspired boy—these social practices would not only lie beyond the erotic but, more elementarily, would not exist.").

61. As noted by Thorkil Vanggaard:

> It appears, then, that emotions and impulses other than erotic ones may cause erection and genital activity in men; just as, in the baboon, mounting and penetrating to show superiority, or sitting on guard with legs apart and penis threateningly exposed show erection of an asexual origin. . . . The same will probably have been the case with the Bronze Age people of Scandanavia—or of northern Italy for that matter—since they equated phallic power with the power of the spear, the sword and the axe, as we can see from their petroglyphs.

THORKIL VANGGAARD, PHALLÓS: A SYMBOL AND ITS HISTORY IN THE MALE WORLD 102 (Thorkil Vanggaard trans., Int'l Univs. Press, Inc. 1972).

62. *See, e.g.*, RON LANGEVIN, SEXUAL STRANDS: UNDERSTANDING AND TREATING SEXUAL ANOMOLIES IN MEN 8 (1983); Joost Dekker & Walter Everaerd, *Psychological Determinants of Sexual Arousal: A Review*, 27 BEHAV. RES. & THERAPY 353, 361 (1989).

63. ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 164–65 (1948).

64. *Id.* at 165.

65. Dekker & Everaerd, *supra* note 62, at 361.

66. Elliston, *supra* note 48, at 854.

this issue arises in what I have elsewhere described as "the ongoing intramural debate within feminism about whether rape should be understood as a crime of violence or sex."[67] Rather than consider the question of sex and power in relation to rape in antinomous terms, consider the following examples. In ancient Rome, when a husband caught another man in bed with his wife, it was acceptable punishment for the husband and/or his male slaves to orally or anally rape the male offender.[68] So too, oral and anal rape were used as a punishment in medieval Persia for various crimes.[69] While it is possible that the person administering the punishment in these circumstances derived some erotic satisfaction from these practices, to characterize them as fundamentally erotic in nature is to radically pervert their meaning. Of course, I don't mean to imply that practices of this kind are subject to "correct" interpretations, since they do not possess meaning independent of interpretation. However, I do think some interpretations better reflect the ways in which the practices are understood by the participants, the significance they hold in the cultures in which they take place, and the unique ways in which sex can be a powerful tool to inflict myriad forms of harm.[70]

Thus, I want to challenge the inclination to declare man/boy fellatio in Melanesia a principally homoerotic practice. Rather, I prefer that we understand these activities not as homoerotic or homosexual, but as *homosocial*. Like Eve Sedgwick, I believe that the descriptor homosocial provides better purchase on the relation between and among men in Sambia society.[71] Rather than reduce that relation to the erotic, to describe it as homosocial leaves room for the role of the erotic while recognizing the "range of ways in which sexuality functions as a signifier"[72] for and instrument in the enforcement of power relations. The work that sex does can be and often is at once symbolic and material, productive and reproductive, pleasurable and dangerous. Close examination of the Sambia male initiation rituals reveals that semen practices function symbolically, metonymically, and literally in the transmission of an ideology of gendered power.

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67. Franke, *supra* note 6, at 740.

68. *See* AMY RICHLIN, THE GARDEN OF PRIAPUS: SEXUALITY AND AGGRESSION IN ROMAN HUMOR 215, 256 (rev. ed., Oxford Univ. Press 1992) (1983).

69. *See* VANGGAARD, *supra* note 61, at 101 ("'A favourite Persian punishment for strangers caught in the *Harem* or *Gynæceum* is to strip and throw them and expose them to the embraces of the grooms and Negro slaves.'" (quoting RICHARD BURTON, THOUSAND NIGHTS AND A NIGHT, Terminal Essay X, at 235 (1885))).

70. As Michel Foucault noted: "Sexuality is not the most intractable element in power relations, but rather one of these endowed with the greatest instrumentality: useful for the greatest number of maneuvers and capable of serving as a point of support, as a linchpin, for the most varied strategies." FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3, at 103.

71. *See* SEDGWICK, *supra* note 5, at 5 (recognizing that aspects of the Sambia culture fit within her "homosocial continuum").

72. *Id.* at 7.

Rather than evidencing the expression of man-boy love or desire, ritualized semen practices amongst the Sambia must be understood relative to their location to larger gender norms in their society. Sambia culture is fundamentally sexually polarized and sexually segregated.[73] Strict divisions of labor and ritual taboos regulating physical contact between the sexes are in evidence throughout the culture.[74] From the time when boys are first isolated from all women at about seven years old, they are taught to disparage women as dangerous creatures whose body fluids can pollute men and deplete their masculine substance.[75] Women are frequently referred to as "dirty polluter,"[76] and men engage in purification rites after coitus, such as nose-bleeding, so as to rid their bodies of female contamination.[77] So dangerous is the threat of pollution from women that public[78] and private[79] spaces are strictly sex-segregated. During the initiation process, men teach boys the reality of the threat that women pose to both maleness and masculinity.

Accompanying the notions of female danger for Sambia are concomitant beliefs about the tremendous material and symbolic power and value of semen. According to Herdt and Stoller, "[s]emen is the most precious human fluid[,] . . . more precious than even mother's milk."[80] Semen is related to human reproduction and growth in several ways. First, men orally inseminate their wives prior to conception, believing that the semen prepares the wife's body for making babies, as well as for lactation when the semen is converted into milk.[81] After oral insemination, the couple engages in repeated vaginal insemination, depositing semen into the woman's womb where it is transformed into a fetus. Mul-

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73. One clear example of this polarization is found in the many spatial segregations evidenced by the Sambia culture. The male "clubhouse," site of many of the masculinization rites, is off limits to women. *See* HERDT, GUARDIANS OF THE FLUTES, *supra* note 11, at 74–75. Similarly, female "menstrual huts" are strictly avoided by men. *See id.* at 75. This spatial segregation operates in many other areas including domiciles and footpaths. *See id.* at 75–76.

74. *See id.* at 28–29.

75. HERDT, SAME SEX, DIFFERENT CULTURES, *supra* note 47, at 113.

76. HERDT, GUARDIANS OF THE FLUTES, *supra* note 11, at 162.

77. *Id.* at 244–45.

78. Herdt observed that, in the Sambia culture:

> Men hold that women may pollute them by simply "stepping over" . . ., above, or beside them, or by touching persons, food, or possessions. During their menstrual periods women leave their houses and retire to the menstrual hut, which is situated slightly below the hamlet. Men and initiates completely avoid the area of the hut. Likewise, women must not walk near the men's clubhouse or look inside.

*Id.* at 75.

79. Domestic arrangements are also organized around the danger of male pollution by women. Upon entering a house, women immediately must squat near the doorway to the house, thereby reducing the possibility of transferring her polluting fluids to men in the house. *See id.* at 75–76.

80. GILBERT HERDT & ROBERT J. STOLLER, INTIMATE COMMUNICATIONS: EROTICS AND THE STUDY OF CULTURE 60 (1990).

81. *Id.* at 62.

tiple inseminations are necessary for this evolution to come off since the creation of a baby requires a critical mass of semen.[82]

Semen is also necessary for human growth. Thus, "[i]nitial growth for every fetus occurs through semen accumulation."[83] Babies grow from the ingestion of breast milk—the Sambia believe women's breasts transform semen into milk.[84] After weaning, young girls continue to grow on their own due to the presence of female blood in their systems. Growth in boys however, requires daily ingestion of semen in order to develop their skin, bones, and male features.[85]

Thus, the Sambia is a highly sex-stratified culture in which men are superior to and vilify women and in which men exclusively possess the elixir necessary for human reproduction and growth. In light of the central role that semen plays in the Sambia gender-based belief system, it would be careless to understand the transmission of semen, either between males or between males and females, solely or even primarily as an erotic practice. Given that fellatio between men and boys is explicitly undertaken to effect the transformation of boys from a feminized to a masculinized state, and is part of a larger indoctrination process whereby the boys learn of and internalize gender norms premised upon male superiority, the integrity of an interpretation of these practices that understands them as primarily erotic in nature is quite questionable. In effect, semen practices are both the lubricant that facilitates and the glue that adheres the representational ideal of male superiority and female inferiority.

In his later writings on the Sambia, Herdt reflects a sensitivity to the critique that he has made the most grave of ethnographic errors—the imposition of his own notions of sexual identity on his subjects:

> But what is it—attraction to the boy, excess libido, power, exhibitionism, fantasies of nurturance, and so on—that arouses the adult male? And is his younger partner also aroused? Should we represent the nature of these desires as homoerotic, not homosexual—that is, as form of desire and not just of social conformity to a sex role?[86]

Yet even here, in interrogating the "meaning" of same-sex semen practices among the Sambia, Herdt's gaze remains transfixed by what he regards as the brute fact of homoerotic arousal. Again, he rejects any interpretation that "peripheralizes the homoerotic ontology."[87]

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82. *See id.* at 63. Interestingly enough, more semen is necessary to make a girl than a boy. *See id.* at 64.

83. *Id.* at 65.

84. *Id.* at 62.

85. *Id.*; *see supra* note 21 and accompanying text (discussing the inherent nature of female maturation versus the artificial nature of male maturation in the Sambia belief structure).

86. Herdt, *Representations of Homosexuality*, *supra* note 43, at 605–06.

87. *Id.* at 607.

To be fair, Herdt does acknowledge the role that "ritualized homosexuality" plays in the masculinization of boys as they become initiated into "the whole male sexual culture."[88] But he fails to see the indispensable relation masculinity bears to misogyny and gender hierarchy within Sambia culture. Herdt's insistent focus on Sambia homoeroticism denies him the opportunity to appreciate the degree to which notions of the superiority of men and the inferiority of women are mutually constitutive within the Sambia culture. Deborah Elliston describes these practices as

> traumatic lessons in social hierarchy for the initiates. . . . [R]itual teachings about men's and women's differences inculcate among men a generalized suspicion and fear of women while simultaneously exalting men's abilities and supremacy; together these teachings instantiate a gender hierarchy.[89]

To represent their man/boy semen practices as being only about male sexuality or only about men elides the systemic nature of sex and gender norms as regulatory ideals amongst Sambia men and women.

Rather than homo*sexual* in nature, Sambia man/boy semen practices are better understood as homo*social*. Sedgwick would term them the product of male homosocial desire rather than male homosexuality.[90] The drape of male homosociality extends beyond the domain of the erotic to other bonds and norms of social identity that regulate inherited privilege, patriarchal power structures, and the enduring inequality of power between women and between men. Lauren Berlant made a similar observation in her reading of Nella Larson's *Passing*,[91] a story about the intimate and intense interactions of two light-skinned women of African descent.[92] Berlant resisted a reading of the text that characterized it as "a classically closeted narrative, half-concealing the erotics between Clare and Irene."[93] Rather, according to Berlant, "there may be a difference between want-

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88. HERDT, SAME SEX, DIFFERENT CULTURES, *supra* note 47, at 121.

89. Elliston, *supra* note 48, at 855.

90. *See* SEDGWICK, *supra* note 5, at 1. As Sedgwick describes:

> "Male homosocial desire" is intended to mark both discriminations and paradoxes. "Homosocial desire," to begin with, is a kind of oxymoron. "Homosocial" is a word occasionally used in history and the social sciences, where it describes social bonds between persons of the same sex; it is a neologism, obviously formed by analogy with "homosexual," and just as obviously meant to be distinguished from "homosexual." In fact, it is applied to such activities as "male bonding," which may, as in our society, be characterized by intense homophobia, fear and hatred of homosexuality. To draw the "homosocial" back into the orbit of "desire," of the potentially erotic, then, is to hypothesize the potential unbrokenness of a continuum between homosocial and homosexual.

*Id.*

91. Nella Larson, *Passing*, *in* QUICKSAND AND PASSING 135 (Deborah E. McDowell ed., 1986).

92. *See id.* at 149–61.

93. Lauren Berlant, *National Brands/National Body: Imitation of Life*, *in* COMPARATIVE AMERICAN IDENTITITES: RACE, SEX, AND NATIONALITY IN THE MODERN TEXT 110, 111 (Hortense J. Spillers ed., 1991).

ing someone sexually and wanting someone's body."[94] For the women in Larson's story, and for the Sambia boys, perhaps the best way to understand their desire for a more privileged person of the same sex is as "a desire to occupy, to experience the privileges of [the other's] body, not to love or make love to her [or him], but rather to wear her [or his] way of wearing her [or his] body, like a prosthesis, or a fetish."[95] The concealed erotics that mediate the race-envy in *Passing* are made literal among the Sambia: the swallowing of semen is necessary for the boy to become a man—for the initiates to occupy adult male bodies. Thus the homosocial as a frame accommodates both the erotic and the gender-generative significance of the Sambia ritualized semen practices. To label the desire underlying the semen practices homosocial rather than homosexual is to situate desire within these interlocking social bonds in such a way that the erotic does not eclipse other relations of power.

Herdt observes the Sambia and represents the same-sex semen practices as fundamentally homoerotic, thereby neglecting the role these practices play in both the creation and maintenance of male supremacy in Sambia culture. If it is true across cultures that "[t]he body requires incessant ritual work to be maintained in its sociocultural form,"[96] then we must acknowledge the ways in which sexual practices produce not only sexual identity, but corporal and social identity as well. "[T]he sutures of [social identity] become most visible under the disassembling eye of an alternative narrative, ideological as that narrative may itself be."[97] Thus, the man/boy semen practices of the Sambia, while astonishing at first, provide an instructive opportunity to challenge the inclination to essentialize certain practices as erotic. I turn next to a less exotic, although no less astonishing, incident which further illustrates the danger in essentializing certain behavior as sexual/erotic. The Sambia and the assault of Abner Louima both illustrate how the classification of practices as sexual holds the danger of obfuscating how sex "*both* epitomizes *and* itself influences broader social relations of power."[98]

## III. ANAL/SEXUAL PRACTICES

On the night of August 9, 1997, Abner Louima was leaving the Rendez-Vous, a nightclub in Brooklyn popular among Haitian immigrants in New York, when the police arrived to break up a fight that had broken out between club patrons.[99] "The white cops started with some

94. *Id.*

95. *Id.*

96. T.O. BEIDELMAN, THE COOL KNIFE: IMAGERY OF GENDER, SEXUALITY, AND MORAL EDUCATION IN KAGURU INITIATION RITUAL 244 (1997).

97. SEDGWICK, *supra* note 5, at 15.

98. *Id.* at 13.

99. *E.g.*, Goozner, *supra* note 12, at 1.

racial stuff," Louima later reported.[100] "They said, 'Why do you people come to this country if you can't speak English?' They called us niggers."[101] One police officer believed Louima had knocked him down during the altercation.[102] The officer later declared, "No one jumps me and gets away with it."[103] Officers pushed Louima to the ground, handcuffed him, and delivered him to the 70th Precinct—beating him severely on the way.[104] Louima was charged with disorderly conduct, obstructing governmental administration, and resisting arrest.[105]

Once at the stationhouse officers strip-searched Louima in a public area, and with his pants down,[106] took him into the men's room where they brutally assaulted him:

> My pants were down at my ankles, in full view of the other cops. They walked me over to the bathroom and closed the door. There were two cops. One said, "You niggers have to learn to respect police officers." The other one said, "If you yell or make any noise, I will kill you." Then one held me and the other one stuck the [wooden handle of a toilet] plunger up my behind. He pulled it out and shoved it in my mouth, broke my teeth and said, "That's your s—t, nigger." Later, when they called the ambulance, the cop told me, "If you ever tell anyone . . . I will kill you and your family."[107]

Louima was then taken to a jail cell, and only after other prisoners complained that he was bleeding did the police call for an ambulance.[108] Louima required surgery to repair a pierced lower intestine and a torn

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100. Mike McAlary, *The Frightful Whisperings from a Coney Island Hospital Bed*, N.Y. DAILY NEWS, Aug. 13, 1997, at 2 (quoting Abner Louima as Louima lay in his hospital bed four days after the attack).

101. *Id.*

102. *See* Richard Goldstein, *What's Sex Got To Do With It? The Assault of Abner Louima May Have Been Attempted Murder. But It Was Also Rape.*, VILLAGE VOICE, Sept. 2, 1997, at 57; Tom Hays, *Haitian's Beating May Have Been Case of Mistaken Identity, Punch*, ARIZ. REPUBLIC, Aug. 22, 1997, at A11 (reporting that witnesses claimed another individual, not Louima, threw the punch against Officer Volpe).

103. *Report: Officer Boasted After Attack*, UPI, Aug. 19, 1997, *available in* LEXIS, Nexis Library, UPI File (reporting the alleged statement of Justin Volpe, New York City police officer).

104. David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody*, N.Y. TIMES, Aug. 13, 1997, at B1 ("[T]he officers became furious when he protested his arrest, twice stopping the patrol car to beat him with their fists."); McAlary, *supra* note 100, at 2.

105. Kocieniewski, *supra* note 104, at B1.

106. Louima recounted the incident to a newspaper as follows:

> "The cops pulled down my pants in front of the desk sergeant." . . . "They marched you naked across the precinct?" "Yes." "There were other cops around?" "Yes. There was the sergeant and other cops. They saw." "And they said nothing?" "I kept screaming, 'Why? Why?' All the cops heard me, but said nothing." "What they said to me I'll never forget. In public, one says, 'You niggers have to learn how to respect police officers.'"

Mike McAlary, *Victim and City Deeply Scarred*, N.Y. DAILY NEWS, Aug. 14, 1997, at 4 (quoting interview with Abner Louima).

107. McAlary, *supra* note 100, at 2.

108. Kocieniewski, *supra* note 104, at B1.

bladder.[109] He remained in the hospital for two months recovering from the injuries he sustained from the police officers at the 70th Precinct.[110]

It took a short while for the media to learn of this vicious assault, yet once they did the headlines screamed: *Police Sodomize Suspect*;[111] *Suspect Claims Police Raped Him with Plunger*;[112] *Officer Accused of Sexually Brutalizing Suspect Arrested.*[113] Members of the Haitian community marched in protest against this outrageous form of police brutality, waving toilet plungers and carrying signs declaring the cops to be "Criminals," "Perverts," "Rapists."[114] A retired transit police officer who attended the march exclaimed: "That's a foul and sordid act they performed on that man."[115] Mayor Giuliani exclaimed that the attack inside the 70th Precinct station was "personally repulsive to him"[116] and that the cops charged with the assault were "perverted."[117] Immediately after the assault, several police officers who were associated with Justin Volpe, one of the officers charged with assaulting Louima, claimed that the Rendez-Vous was a gay club and that Louima's injuries stemmed from violent anal sex he had engaged in while at the club.[118] When the two police officers arrested in connection with the assault appeared for their arraignment, courthouse protesters taunted the cops by calling them "faggots."[119] The district attorney charged the officers with aggravated sexual abuse and first-degree assault, both class B felonies for which they could receive a maximum sentence of 24 years.[120] Only later was the

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109. *See* Tom Hayes, *Officer Accused of Sexually Brutalizing Suspect Arrested*, ASSOCIATED PRESS, Aug. 13, 1997, at 1 (as reproduced by a number of newspapers).

110. *See Louima Starts on Long Road Back*, NEWSDAY, Oct. 12, 1997, at A39.

111. J. Zamgba Browne, *Police Sodomize Suspect: The Tale of Torture at 70th Precinct*, N.Y. AMSTERDAM NEWS, Aug. 20, 1997, at 1.

112. *Suspect Claims Police Raped Him with Plunger*, SALT LAKE TRIB., Aug. 14, 1997, at A13.

113. Hayes, *supra* note 109, at 1; *see also New York Officer Surrenders in Sexual Assault on Immigrant*, L.A. TIMES, Aug. 14, 1997, at A18; *Cop Surrenders on Sexual Brutality Charges*, SAN DIEGO UNION & TRIB., Aug. 14, 1997, at A12.

114. *See* Vinette K. Pryce, *A Week of Outrage, Pain and Celebration*, N.Y. AMSTERDAM NEWS, Sept. 10, 1997, at 1 (containing photograph of protester at march shown holding sign saying "Criminals, Perverts, Rapists").

115. Charles Baillou, *Marchers Blast Police Barbarism at City Hall*, N.Y. AMSTERDAM NEWS, Sept. 10, 1997, at 8.

116. David Firestone, *Giuliani's Quandary: Mayor Who Linked Name to Police Success Is Now Facing a Very Ugly Police Failure*, N.Y. TIMES, Aug. 15, 1997, at A1.

117. The press reported that, during the assault of Louima at the 70th precinct, one of the officers said: "This is Giuliani time, not Dinkins time." Eleanor Randolph, *In Police Abuse Case, Giuliani's Balance Tested*, L.A. TIMES, Aug. 16, 1997, at A1. *But see* Carolina Gonzalez & Bill Hutchinson, *Sharpton Promises He'll Defend Louima*, N.Y. DAILY NEWS, Jan. 19, 1998, at 8 (reporting that Louima now is unsure of whether the officer actually made this statement). Mayor Giuliani provided a quite interesting response to reports of the officer's alleged comment: "The remark is as perverted as the alleged act." Randolph, *supra*, at A1.

118. John Sullivan, *New Charges Filed in Police Brutality Case*, N.Y. TIMES, Aug. 22, 1997, at B3.

119. Goldstein, *supra* note 102, at 57.

120. *See* Goozner, *supra* note 99, at 1; *see also* N.Y. PENAL LAW § 120.10 (McKinney 1998) (first degree assault); *id.* § 130.70 (first degree aggravated sexual abuse).

indictment amended to include aggravated harassment, a racial bias crime for which the maximum sentence is, interestingly enough, only four years.[121]

It was precisely the sexual aspect of this assault that provoked journalists to grant Louima the moniker: "America's most famous victim of police brutality since Rodney King."[122] Sure, the police get carried away from time to time,[123] shoot at fleeing suspects when deadly force isn't called for,[124] choke a suspect to death with a choke hold,[125] or even rape female prostitutes in a brothel they had raided.[126] But, as *Village Voice* journalist Richard Goldstein observed, "None of these documented cases arouse the outrage of this 'barbaric' act, which . . . is only supposed to happen in the Third World. *Here in the land of the free, when it comes to police brutality, we draw the line at raping a man.*"[127]

That this crime is heinous cannot be denied, but is it best characterized as a sex crime? What exactly was sexual about this assault? As Goldstein asked: "*What's Sex Got To Do With It?*"[128] Virtually every report of the case mentions early in the article that Louima is married and has children, and nightly news broadcasts regularly showed pictures of Louima and his family in the days following the assault.[129] What is more, the assailants were portrayed as healthy heterosexuals by the media.

So why call it a sex crime? The easy answer is tautological: The allegations fit the description of crimes so labeled.[130] But what is a sex crime? There are several ways in which to differentiate a sexual assault from an assault *simpliciter*: (i) it is motivated by the erotic desire of the perpetrator; (ii) it involves contact with the perpetrator's or the victim's

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121. *See 2 NYC Officers Get New Charge in Haitian's Beating*, BOSTON GLOBE, Sept. 9, 1997, at A8; *see also* N.Y. PENAL LAW § 240.31 (first degree aggravated harassment).

122. Mike McAlary, *Home Sweet Heartache: Love Alone Won't Aid Louima in Brooklyn*, N.Y. DAILY NEWS, Oct. 10, 1997, at 3.

123. A New York City commission report provides two examples:

> One officer from a Brooklyn North precinct told us how he and his colleagues once threw a bucket of ammonia in the face of an individual detained in a precinct holding pen. Another cooperating officer told us how he and his colleagues threw garbage and then boiling water on a person hiding from them in a dumbwaiter shaft.

CITY OF NEW YORK, COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT 47 (1997) [hereinafter MOLLEN REPORT].

124. *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT 37–54 (1996).

125. *See id.* at 26.

126. *See id.* at 47.

127. Goldstein, *supra* note 102, at 57 (emphasis added).

128. *Id.*

129. *See, e.g.*, Charles Baillou, *Angry Haitians March at the 70th Precinct in Brooklyn*, N.Y. AMSTERDAM NEWS, Aug. 27, 1997, at 1; *Nightline: The Blue Wall, Police Brutality and Police Silence* (ABC television broadcast, Aug. 22, 1997).

130. *See, e.g., infra* note 136 (providing the N.Y. Penal Code's definition of first degree aggravated sexual abuse).

sexual body parts (e.g., vagina, breasts, or penis) or involves acts which are typically regarded as sexual (e.g., kissing, fellatio, sexual intercourse); or (iii) it is experienced as sexual by the victim.

The New York Penal Law defines criminal sexual offenses[131] to be rape,[132] sodomy,[133] sexual misconduct,[134] sexual abuse,[135] aggravated sexual abuse,[136] and course of sexual conduct against a child.[137] Two of these crimes explicitly anchor the crime's sexual nature, in whole or in part, in the satisfaction of sexual desire: criminal sexual abuse and course of sexual conduct against a child. The Penal Law defines criminal sexual abuse as *sexual contact* with another person by force or when the person is incapable of granting consent.[138] Course of conduct against a child is committed when, among other things, a person engages in aggravated *sexual contact* with a child less than 11 years old.[139] As a foundation for these two violations, the Penal Code defines "sexual contact" as "any touching of the sexual or other intimate parts of a person not married to the actor *for the purpose of gratifying sexual desire of either party.*"[140]

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131. *See* N.Y. PENAL LAW §§ 130.00–.85 (McKinney 1998 & Supp. 1998) (listing New York's sex offenses).

132. *Id.* §§ 130.25–.35.

133. *Id.* §§ 130.38–.50.

134. The New York Penal Law defines sexual misconduct as:

> 1. Being a male, he engages in sexual intercourse with a female without her consent; or
> 2. He engages in deviate sexual intercourse with another person without the latter's consent; or
> 3. He engages in sexual conduct with an animal or a dead human body.

*Id.* § 130.20. "Deviate sexual intercourse" is defined as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." *Id.* § 130.00(2).

135. *Id.* §§ 130.55–.65. As set forth in the New York Penal Law, first degree sexual abuse occurs when:

> [A person] subjects another person to sexual contact:
> 1. By forcible compulsion; or
> 2. When the other person is incapable of consent by reason of being physically helpless; or
> 3. When the other person is less than eleven years old.

*Id.* § 130.65.

136. First degree aggravated sexual abuse occurs when:

> [A person] inserts a foreign object in the vagina, urethra, penis or rectum of another person causing physical injury to such person:
> (a) By forcible compulsion; or
> (b) When the other person is incapable of consent by reason of being physically helpless; or
> (c) When the other person is less than eleven years old.

*Id.* § 130.70(1).

137. First degree course of sexual conduct against a child occurs when "over a period of time not less than three months in duration, [a person] engages in two or more acts of sexual conduct, which includes at least one act of sexual intercourse, deviate sexual intercourse or aggravated sexual contact, with a child less than eleven years old." *Id.* § 130.75; *see also id.* § 130.80 (second degree course of sexual conduct against a child).

138. *Id.* § 130.65.

139. *See supra* note 137.

140. N.Y. PENAL LAW § 130.00(3) (emphasis added). In its entirety, "sexual contact" means:

> [A]ny touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the

But since the satisfaction of sexual desire must be accomplished by touching sexual or intimate parts, it must be those parts that make this conduct a sex crime. Yet what are sexual or other intimate parts? Courts have found the chest,[141] the upper leg,[142] the leg,[143] the mouth,[144] and the navel[145] to be "sexual or intimate parts" for purposes of the criminal sexual abuse statute. Further, it has been established that "'intimate parts' is much broader than the term 'sexual parts'" and that "intimacy . . . must be viewed within the context in which the contact takes place. . . . [A] body part which might be intimate in one context, might not be intimate in another."[146] So really, any body part could be considered a sexual or intimate body part depending upon the context. Thus, it appears that it is the perpetrator's erotic desire that sexualizes the body part, thus making contact with that body part a sex crime.

But it cannot be the perpetrator's desire that sets some crimes apart as sex crimes. Sexual misconduct, rape, sodomy, and aggravated sexual abuse are all premised upon penetration of the vagina, rectum, or mouth.[147] The satisfaction of sexual desire is irrelevant to these crimes. So, at least for purposes of the criminal law, these body parts are essentially sexual, thus rendering crimes involving them, ipso facto, sex crimes.

The Sex Offender Registration Act,[148] New York's version of "Megan's Law,"[149] provides a salient example of the power of law to label or mark certain behavior as sexual exogenously. In New York, persons who have been convicted of rape, sodomy, sexual abuse, aggravated sexual abuse, incest, sexual performance by a child, unlawful imprisonment, or kidnapping of a person under 17 years old are subject to the notification and registration provisions of the New York Sex Offender Registration Act.[150] The last two categories, unlawful imprisonment and kidnapping of

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actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing.

*Id.*

141. *See* People v. Cammarere, 611 N.Y.S.2d 682, 684 (App. Div. 1984).

142. *See* People v. Gray, 607 N.Y.S.2d 828, 829 (App. Div. 1994).

143. *See* People v. Graydon, 492 N.Y.S.2d 903, 904 (Crim. Ct. 1985).

144. *See* People v. Rondon, 579 N.Y.S.2d 319, 320–21 (Crim. Ct. 1992); People v. Rivera, 525 N.Y.S.2d 118, 119 (Sup. Ct. 1988).

145. *See* People v. Belfrom, 475 N.Y.S.2d 978, 980 (Sup. Ct. 1984).

146. *Rivera*, 525 N.Y.S.2d at 119.

147. *See* N.Y. PENAL LAW § 130.20 (McKinney 1998) (necessary element of sexual misconduct is sexual intercourse which is defined as "its ordinary meaning and occur[ing] upon any penetration, however slight" pursuant to *id.* § 130.00(1)); *id.* § 130.35 (necessary element of rape is sexual intercourse as defined *supra*); *id.* § 130.50 (necessary element of sodomy is sexual intercourse as defined *supra*); *id.* § 130.70 (aggravated sexual abuse requires "insert[ion] of a foreign object in the vagina, urethra, penis, or rectum of another person").

148. N.Y. CORRECT. LAW §§ 168–168-v (McKinney Supp. 1998).

149. N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995 & 1998).

150. New York law requires the registration of "sex offenders." N.Y. CORRECT. LAW § 168-b. The statute defines "sex offender" as a person convicted of certain enumerated offenses. *See id.* §

a person under 17 years old, in no way require the crime to have been sexual in nature, yet the law labels persons convicted of these crimes sex offenders.[151] What is more, parents of the person imprisoned or kidnapped are specifically exempt from the notification law[152]—the presumption being that no parent would kidnap or imprison their own child for sexual reasons. This is, of course, a demonstrably false premise.

This brief tour through the New York penal law illustrates that those behaviors labeled sex crimes bear, at best, a family resemblance to one another. The answer to the question—What makes something a sex crime?—is not revealed in the positive law itself. Instead, a complex set of interpretive moves are required to ascribe a sexual nature to the behavior. Some of the symbolic work is done endogenously by one or both of the parties involved, and some of it is done exogenously by those who act as public interpreters of the behavior—prosecutors, judges and juries. But in all cases, that which makes the crime sexual "is a discursive formation . . . not a fact or property of the body."[153]

So what rendered the assault of Abner Louima a sex crime? Of course, the penetration of his rectum. But why? Surely we would not want to ground the sexual nature of the crime in the erotic pleasure, latent or otherwise, that the officers received from performing this act. Mr. Louima certainly did not experience this assault as erotic. Nor would we want to say that the violent insertion of a wooden handle in a person's rectum is intrinsically a sexual act, or that any act involving a rectum is to be so construed.

Nevertheless, most people would want to say that there was something particularly wrong with this assault that distinguishes it from an equally violent punch in the face or a kick in the ribs. Justin Volpe, the police officer charged with principal responsibility for Louima's injuries, was quoted as having said to other cops on the night of the assault: "I had to break a man."[154] In this comment lies the key for understanding the power and the wrong of the assault on Louima. I suggest that the power of the assault principally lies not in its sexual nature, simpliciter, but in the unique way that it humiliated Louima as a black man. For white men,

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168-a(1) (referencing the offenses listed in section 168-a(2), (3)). These enumerated offenses consist of those crimes listed in the text accompanying this note. *See id.* § 168-a(2), (3).

151. Under the New York penal code, unlawful imprisonment in the second degree occurs when "[a] person . . . restrains another person." N.Y. PENAL LAW § 135.05. First degree unlawful imprisonment must meet this definition plus "expose the [victim] to a risk of serious physical injury." *Id.* § 135.10. Kidnapping in the second degree occurs when "[a] person . . . abducts another person." *Id.* § 135.20 First degree kidnapping must meet this definition plus include one of a number of other circumstances including: death, intent to extract a ransom, or restraint for more than twelve hours with intent to "[i]nflict physical injury upon him or violate or abuse him sexually." *Id.* § 135.25.

152. *Id.* § 135.15 (unlawful imprisonment); *id.* § 135.30 (kidnapping).

153. Bell, *supra* note 16, at 86 (attributing this argument to Michel Foucault).

154. *See* Goldstein, *supra* note 102, at 57.

particularly white police officers, to assault a black man anally is one of the most powerful ways to assault black masculinity. Tragically, Louima is not the first man to experience this kind of assault. At least six black men, all immigrants, have complained that a white police officer abducted them, took them to an isolated place in Queens, and anally raped them at gunpoint.[155] The victims and witnesses report that the cop threatened them with death if they spoke to the authorities about these assaults.[156] What distinguished Louima's assault from other incidents of police violence was not that it was sexual, but that the police officers got caught.

A preoccupation with the supposedly sexual nature of these assaults deflects attention away from the gender and race-based nature of this crime. Here we have an example of what is commonly thought to be a sexual act being used as an instrument of gender- and race-based terror.[157] One cannot understand the meaning of this conduct without taking into account its gender- and race-based significance. To view it as primarily sexual is to make the same mistake as that made by Herdt in Melanesia—it is to essentialize certain conduct and body parts as sexual, and to occlude the ways in which "the sexual" can be deployed as the instrumentality by which other forms of power and supremacy are cultivated.[158] After all, the Louima incident began with a police officer telling him, "You niggers have to learn to respect police officers."[159]

What is more, hyper-sexualizing the Louima assault carries the additional danger of normalizing other violent police practices because they aren't sexually barbaric. Recall Richard Goldstein's observation: "[W]hen it comes to police brutality, we draw the line at raping a man."[160] Other non-sexual forms of police violence may be regrettable, but many

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155. Earl Caldwell, *Police Sodomy in Queens: The Column the* Daily News *Killed*, N.Y. AMSTERDAM NEWS, Aug. 27, 1997, at 12 [hereinafter Caldwell, *Police Sodomy in Queens*]. The "black" newspapers in New York reported these incidents at great length, but none of the "white" papers have mentioned them. *See* Earl Caldwell, *Earl Caldwell to the* Daily News . . . *'I warned you. You fired me.'*, N.Y. AMSTERDAM NEWS, Aug. 27, 1997, at 1 ("The major papers seemed to have a blackout of the story. The [New York] Daily News had published nothing. The New York Times had published no story either.").

156. Caldwell, *Police Sodomy in Queens*, *supra* note 155, at 12.

157. In a characteristically laconic passage in BELOVED, Toni Morrison depicts the acrid humiliation suffered by African American men on a chain gang who are forced each morning by white male guards to put on their own chains, kneel down in a row and fellate the guards on demand. *See* TONI MORRISON, BELOVED 107–08 (1987). I read this passage not to be principally about the expropriation of sex from African American men, but rather about the routine ways in which sexual practices were used to degrade these prisoners.

158. *See supra* Part II (discussing and rejecting Herdt's representation of seminal/sexual practices in Papua New Guinea as primarily a function of homoeroticism).

159. *See* McAlary, *supra* note 100, at 2 (quoting Abner Louima's recollection of an officer's statement just prior to the insertion of a plunger into Louima's anus).

160. *See* Goldstein, *supra* note 102, at 57.

may view this behavior as a kind of police-based *droit du seigneur.*[161] In fact, it may well be the case, as Goldstein argues, that there is a kind of sadist satisfaction that accompanies the use of handcuffs, choke holds, or other excessive methods of police restraint, such as hog-tying suspects.[162] To regard the Louima assault as the exception, where perverted cops acted completely beyond the pale, "prevents us from imagining that cops who specialize in [violent] tactics might find them exciting."[163] To over-eroticize the treatment of Louima carries the danger of under-eroticizing police tactics that do not involve penetration of a "sexual or intimate body part."[164] After all, since Kinsey suggested that young men can get aroused by being chased by police,[165] why shouldn't police get aroused when running after suspects? Recent misconduct charges filed against a police officer in Seattle lay bare the erotic potential of routine police practices.[166]

Which, of course, prompts the most fundamental of questions: Is it the sexual/erotic nature of any of these practices that makes them wrong? For the most part, I think not. It seems to me that these incidents should be analyzed in order to uncover the way in which the sexual/erotic operates as a particularly efficient and dangerous conduit with which to exercise power. Thus, to say that the Louima assault was sexual is at once to say too much and not enough about it. As Ana Ortiz has explained so eloquently, this simple construction of the injury of Louima's assault occludes the particularly gendered and raced salience of anal penetration for a Caribbean Black man.[167] "They have always taken us for this frail and vulnerable community," said Tatiana Wah, a Haitian activist who was one of the organizers of the march protesting the police assault of Louima.[168] The anal assault of Louima, performed not in private, but in front of an audience of white cops on their turf, effectively enacted the perceived frailness and vulnerability of Haitian men.

How best to avoid the erasure of racial- or gender-based subordination by and through the invocation of the sexual? In the section that fol-

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161. *Droit du seigneur*, or "right of the lord," historically referred to "a supposed legal or customary right at the time of a marriage whereby a feudal lord had sexual relations with a vassal's bride on her wedding night." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 633 (1993).

162. Goldstein, *supra* note 102, at 57.

163. *Id.*

164. *See supra* notes 138–46 and accompanying text (discussing the New York Penal Law's definition, and subsequent judicial interpretations, of the term "sexual contact").

165. *See* KINSEY ET AL., *supra* note 63, at 164.

166. After flirting with a female bartender while on his break, a male police officer followed her when she drove home from work, pulled her over and teasingly said, "Now you know what it's gonna be like to be arrested." Ronald K. Fitten, *County Officer Faces Charges of Misconduct*, SEATTLE TIMES, Oct. 24, 1998, at A7. "He then took her out of the car, handcuffed her, grabbed her hair and pulled her head back and began to fondle her sexually." *Id.*

167. *See* Ana Ortiz, Remarks at the InterSEXionality Symposium, University of Denver College of Law, Feb. 6, 1998 (transcript on file with *Denver University Law Review*).

168. Richard Goldstein & Jean Jean Pierre, *Day of Outrage*, VILLAGE VOICE, Sept. 9, 1997, at 44 (quoting Tatiana Wah).

lows, I will consider the desexualization of sodomy, rape, and other assaults labeled sex crimes.

## IV. THE DESEXUALIZATION OF VIOLENCE

Beginning with *The History of Sexuality*, Michel Foucault developed a theory of the discursive truth of sex[169] and, for present purposes, a critical analysis of the means by which certain forms of knowledge-based power are deployed such that sexuality gets anchored in certain parts of the body.[170] The examples I provide above from the New York Penal Law illustrate quite well Foucault's point: The Penal Law does not merely pick out the set of practices which are truly sexual in nature, but rather, certain body parts or practices become sexual by virtue of their regulation by law.[171] As a result, different parts of the body become attached to different fields of knowledge: When we interrogate practices involving the genitals we are, by definition, learning something sexual.

Shortly after the publication of *The History of Sexuality*, Foucault entered into a set of discussions with feminists about rape.[172] Given his concerns about the dangers of punishing sexuality, Foucault poses the question: "What should be said about rape?"[173] In these conversations, he urges the position that "when one punishes rape one should be punishing physical violence and nothing but that. . . . [I]t may be regarded as an act of violence, possibly more serious, but of the same type, as that of punching someone in the face."[174] Well, Foucault is unequivocally weighing in on the violence side of the sex vs. violence debate among feminists about the meaning of rape.[175]

In response to the women who objected to his insistence upon desexualizing rape, Foucault reveals his true concern. By making rape a "sex" crime, we are once again anchoring sexuality in certain parts of the body, and in so doing, "the body is discursively marked [thereby] construct[ing] certain parts of the body as more important than others."[176] By bestowing this "special" status upon parts of the body marked sexual, "sexuality as such, in the body, has a preponderant place, the sexual organ isn't like a hand, hair, or a nose. It therefore has to be protected, sur-

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169. *See* FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3, at 57–63.

170. *See id.* at 152 ("Is 'sex' really the anchorage point that supports the manifestations of sexuality, or is it not rather a complex idea that was formed inside the deployment of sexuality?").

171. *See supra* notes 131–51 and accompanying text (disscussing the New York Penal Law's treatment of sex offenses).

172. *See* FOUCAULT, POLITICS, *supra* note 15, at 200–04; Bell, *supra* note 16, at 84–87.

173. FOUCAULT, POLITICS, *supra* note 15, at 200. Foucault sets up the discussion with the provocative declaration that "in any case, sexuality can in no circumstances be the object of punishment." *Id.*

174. *Id.* at 200–01.

175. *See, e.g.*, Franke, *supra* note 6, at 740–44 (discussing the debate among feminists concerning the proper meaning of rape—as a crime of violence or sex).

176. Bell, *supra* note 16, at 92.

rounded, invested in any case with legislation that isn't that pertaining to the rest of the body."[177]

Many feminists would respond: So what's wrong with that? Sexual assaults are different. Foucault's concern derives from the way in which the deployment of sex in this fashion occludes the way in which power operates on the body, "ordering it as it studies, organizing its movements as it observes, categorizing as it probes. In this way, power, or power/knowledge, produces our understanding of the body."[178] Thus, for Foucault, sex is not a thing we have or do, but is instead a regulatory ideal. Judith Butler expresses a similar interest in the ways in which "sex" "produces the bodies it governs"[179] and in so doing, produces bodies that matter, and bodies that don't. Wendy Brown pushes these Foucaultian insights in yet another direction, illuminating the danger of a rights-based politic that is built upon the naturalization of identity which is, in fact, the result of a regulatory ideal: "[D]isciplinary productions of identity may become the site of rights struggles that naturalize and thus entrench the powers of which those identities are the effects."[180]

It is the regulatory power of sex that Foucault seeks to interrupt by questioning the need to treat rape differently from a punch in the face. To his mind, we stand to gain much and lose little by punishing the physical violence of rape "without bringing in the fact that sexuality was involved."[181]

For the most part, I find myself in agreement with Foucault's theoretical point, yet I think Monique Plaza is right when she argues that women, in particular, cannot afford the jump into the realm of the ideal.[182] While in principle, there is much to Foucault's suggestion that we treat rape and "non-sexual" assault as crimes of violence, to recommend such a change in the positive laws at this moment means that rape victims will bear the transition costs of this representational reform. That is, rape victims will continue to experience rape as an assault to their sexual body during the period in which the withdrawal of regulation by sex crime laws transforms the way we know the body.

In order to reconcile the tension between the damage done by laws that perpetuate "the sexual" as a regulatory ideal, and the cost to rape victims of demanding that the law not recognize a sexual aspect to their

177. FOUCAULT, POLITICS, *supra* note 15, at 201–02.

178. Bell, *supra* note 16, at 87.

179. JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 1 (1993). In addressing Foucault's "regulatory ideal," Butler notes: "[S]ex not only functions as a norm, but is part of a regulatory practice . . . whose regulatory force is made clear as a kind of productive power, the power to produce—demarcate, circulate, differentiate—the bodies it controls." *Id.*

180. WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 120 (1995).

181. FOUCAULT, POLITICS, *supra* note 15, at 202.

182. Monique Plaza, *Our Costs and Their Benefits*, *in* M/F: A FEMINIST JOURNAL 28, 35 (1980).

injury, I now turn to what I regard to be an example of a compromise position—the recognition of sex-based violence as a violation of international humanitarian law.

## V. RAPE AND TORTURE

Between 1991 and 1995 an inter-ethnic, inter-religious war devastated the country that had been known as Yugoslavia. Rape and sexual assault have always been a part of war, but what happened "in Bosnia and Herzegovina to Muslim and Croatian women seems unprecedented in the history of war crimes. Women [were] raped by Serbian soldiers in an organized and systematic way, as a planned crime to destroy a whole Muslim population, to destroy a society's cultural, traditional and religious integrity."[183] Serbian soldiers were not the only ones accused of using rape and other sexual assault as an instrument of war in the former Yugoslavia. Muslim and Croat soldiers as well have been found to have engaged in sex-based atrocities in manners similar to those used by the Serbs.[184] Never has this seemingly inevitable aspect of war been granted the degree of international attention and consternation as have the atrocities committed in the former Yugoslavia. In what came to be called euphemistically as "ethnic cleansing," Serbs established camps that were "set up for the purpose of rape [of Bosnian Muslim women] . . . to impregnate the women."[185] Furthermore, they detained pregnant women until abortion was no longer an option.[186] A U.N. Commission characterized this pattern of rape[187] as "part of a policy of 'ethnic cleansing.'"[188] While mass executions of civilians also characterized the inhumanity that lay at the core of this conflict, it was clear that both women and men

183. Slavenka Drakulic, *Rape After Rape After Rape*, N.Y. TIMES, Dec. 13, 1992, § 4, at 17.

184. See Prosecutor v. Delalic et al., Judgment, Case No. IT-96-21-T (ICTY Nov. 16, 1998) [hereinafter Celebici Judgment]. Seventy-eight suspects have been indicted by the tribunal. *See* Charles Trueheart, *Bosnian Muslims, Croat Convicted of Atrocities Against Serbs*, WASH. POST, Nov. 17, 1998, at A34. The majority of those charged with committing war crimes are Bosnian Serbs, and most of the tens of thousands of victims of the 1991–95 war were Croats and Muslims. *See id.* However, "most of those indicted who have surrendered or been arrested are Muslims or Croats; the tribunal's two convictions to date involved a Bosnian Serb and a Croat, and one Bosnian Serb has confessed." *Id.* The indictment of Slobodan Milosovic, the Bosnian Serb leader, has yet to result in his arrest.

185. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, 49th Sess. ¶ 248, U.N. Doc. S/1994/674 (1994)) [hereinafter *Final Report*].

186. *Id.*

187. The *Final Report* identified five patterns of rape, of which the rape camp for the purposes of ethnic cleansing was one. *Id.* ¶¶ 244–45. Four other patterns were recognized: (1) rapes occurring in conjunction with looting and intimidation, (2) rapes occurring in conjunction with fighting in the area, (3) rapes at detention facilities, and (4) rapes at detention facilities established for the "sole purpose of sexually entertaining soldiers." *Id.* ¶¶ 245–47, 249.

188. One Muslim woman was told that "she would give birth to a chetnik boy who would kill Muslims when he grew up." *Id.* ¶ 249.

were victims of sexual assault, as sex-related violence became "a weapon of war"[189] in ways never seen before.

In response to enormous pressure placed upon the United Nations from its member states as well as from international media, in May 1993 the U.N. Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY" or the "Tribunal") with the "power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[190] Pursuant to the Statute of the International Tribunal ("Tribunal Statute"), the Tribunal has authority to prosecute individuals who have committed, among other things, (i) Grave Breaches of the Geneva Conventions of 1949,[191] (ii) Violations of the Customs of War,[192] (iii) Genocide,[193] and (iv) Crimes Against Humanity.[194] The Tribunal Statute specifically enumerates rape as a Crime Against Humanity when committed in armed conflict and directed against any civilian population.[195] In his report elaborating the specific grounds for Tribunal jurisdiction, the Secretary General set forth that Crimes Against Humanity includes "torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[196] Specifically, the Secretary General declared that "[i]n the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including forced prostitution."[197] Thus, in this Tribunal, rape and sexual assault were for the first time to be prosecuted as serious violations of international humanitarian law.[198]

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189. *Rape Becomes a Weapon of War*, N.Y. TIMES, Jan. 10, 1993, § 4, at 4.

190. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. SCOR, 48th Sess., Annex, art. 1, at 36, U.N. Doc. S25704 (1993), *reprinted in* 32 I.L.M. 1163, 1192 (1993), *available at* <http://www.un.org/icty/basic/i-bencon.htm> (visited Sept. 2, 1998) [hereinafter *Tribunal Statute*] (setting forth the Statute of the International Tribunal in the annex), *adopted by* S.C. Res. 827, U.N. SCOR, 48th. Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993). Many documents from the International Criminal Tribunal for the Former Yugoslavia, including the indictments and opinions discussed *infra*, are available from the ICTY homepage, <http://www.un. org/icty/> (visited Sept. 20, 1998).

191. *Tribunal Statute*, *supra* note 190, art. 2, at 36.

192. *Id.* art. 3, at 37.

193. *Id.* art. 4, at 37.

194. *Id.* art. 5, at 38.

195. *See id.* art. 5(g), at 38.

196. *Id.* ¶ 48.

197. *Id.*

198. *See* Justice Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 231 (1997) ("The ICTY is setting an important precedent in respect to gender related crimes because it is the first time that systematic mass rape is ever being charged and prosecuted as a war crime."); Jennifer Green et al., *Affecting the Rules for the*

Since its creation in 1993, the Tribunal has investigated and prosecuted extreme forms of human cruelty and brutality, some of which were sexual in nature. In interesting ways, the manner in which sexual violence is characterized by the Tribunal, as well as the particular provisions of international human rights law that it has invoked to prosecute sex-based violence, has evolved over this period. The changes occurring within the Tribunal in this regard reflect an increasingly sophisticated approach to the role that sex can play in the degradation, humiliation, torture, and great suffering experienced by the victims of this horrible war.

In May 1992, Serb forces were alleged to have rounded up and sent to the Omarska Prison Camp roughly 3,000 Muslims and Croats, in particular intellectuals, professionals, and political leaders.[199] Of these prisoners, approximately forty were women.[200] Conditions in Omarska were horrible, and soldiers subjected many civilians "inside and outside the camps to a campaign of terror which included killings, torture, sexual assaults, and other physical and psychological abuse."[201] In February 1995, the Tribunal Prosecutor issued two separate indictments, the Meakic indictment[202] and the Tadic indictment,[203] in connection with atrocities committed by Serbian forces against Croat Muslims at Omarska. Both indictments, commonly referred to as the Omarska indictments, contained allegations of sexual violence—in the Meakic case primarily by men against women,[204] and in the Tadic case by men against

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*Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN'S L.J. 171, 173 & n.5 (1994). The International Criminal Tribunal for Rwanda, a sister United Nations war crimes tribunal to the ICTY, has undertaken prosecution of similarly heinous sex-based atrocities committed in 1994 during the ethnic war in Rwanda. On September 2, 1998, the Rwanda War Crimes Tribunal issued a final judgment in which it determined that Jean-Paul Akayesu, a Hutu official, was guilty of nine counts of genocide and crimes against humanity for having incited the rape and sexual assault of Tutsi women. *See* Prosecutor v. Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T (ICTY Sept. 2, 1998), *available at* <http://www.un.org/ictr/english/judgments/akayesu.html> (visited Dec. 21, 1998).

199. *See* Prosecutor v. Meakic, Indictment, Case No. IT-95-4, ¶ 1 (ICTY Feb. 13, 1995) [hereinafter Meakic Indictment], *reprinted in* 34 I.L.M. 1013, 1014.

200. *See* Prosecutor v. Tadic, Second Amended Indictment, Case No. IT-94-1-T, ¶ 2.3 (ICTY Dec. 14, 1995) [hereinafter Tadic Second Amended Indictment], *reprinted in* 36 I.L.M. 908, 915.

201. Prosecutor v. Tadic, Opinion and Judgment, Case No. IT-94-1-T, ¶ 377 (ICTY May 7, 1997) [hereinafter Tadic•Opinion], *excerpts reprinted in* 36 I.L.M. 908 (exerpting paragraphs 1–12, 557–765 of the Opinion and paragraphs 1–14 of the Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute).

202. Meakic Indictment, *supra* note 199.

203. Prosecutor v. Tadic, Initial Indictment, Case No. IT-94-1-T (ICTY Feb. 13, 1995), *reprinted in* 35 I.L.M. 1011, 1028 [hereinafter Tadic Initial Indictment]. The Tadic Initial Indictment was amended twice. *See* Prosecutor v. Tadic, First Amended Indictment, Case No. IT-94-1-T (ICTY Sept. 1, 1995); Tadic Second Amended Indictment, *supra* note 200; *see also* Tadic Opinion, *supra* note 201, ¶ 36. Given the posture of the following argument, subsequent citations will be to the initial indictment with pertinent alterations provided when necessary.

204. Meakic Indictment, *supra* note 199, ¶¶ 2.6, 22.1, 25.1, 26.1, 30.1.

both women and men.[205] The allegations of rape and sexual violence in both cases are absolutely horrifying, yet as was typical for indictments filed early in the Tribunal's tenure, the Prosecutor's juridical treatment of these atrocities differed depending upon the sex of the victim.

In the Meakic indictment, the Prosecutor charged Serbian soldiers with a number of violations of international humanitarian law. Among them were charges that, between May and December 1992, Serbian soldiers had repeatedly raped female prisoners at Omarska.[206] Croatian women were forcibly removed from their beds at night, taken to a room downstairs, thrown on a table or on the floor and repeatedly raped, night after night.[207] Young women between the ages of 12 and 19 were the most vulnerable. A prisoner with medical training who was assigned to treat and counsel many of the rape victims, testified before the Tribunal:

> The very act of rape, in my opinion—I spoke to these people, I observed their reactions—it had a terrible effect on them. They could, perhaps, explain it to themselves when somebody steals something from them, or even beatings or even some killings. Somehow they sort of accepted it in some way, but when the rapes started they lost all hope. Until then they had hope that this war could pass, that everything would quiet down. When the rapes started, everybody lost hope, everybody in the camp, men and women. There was such fear, horrible.[208]

For this conduct, the Prosecutor charged Serbian soldiers with, among other things, Grave Breaches of the Geneva Convention of 1949 under Article 2(c) of the Tribunal Statute (wilfully causing great suffering or serious injury to body or health),[209] Violations of the Laws or Customs of War under Article 3 of the Tribunal Statute,[210] and Crimes Against Humanity under Article 5(g) (rape).[211] Contrast this construction

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205. Tadic Initial Indictment, *supra* note 203, ¶¶ 4.1, 5.1. The charges associated with paragraph 4.1 were ultimately withdrawn at trial. *See* Tadic Opinion, *supra* note 201, ¶ 37 (noting the withdrawal of the charges associated with paragraph 5 of the Second Amended Indictment which corresponds to paragraph 4.1 of the Initial Indictment).

206. Meakic Indictment, *supra* note 199, ¶¶ 22.1–22.16, 25.1–25.4, 26.1–26.4, 30.1–30.4.

207. *See id.* ¶ 22.1; *see also* Tadic Opinion, *supra* note 201, ¶ 165 ("Women who were held at Omarska were routinely called out of their rooms at night and raped. One witness testified that she was taken out five times and raped and after each rape she was beaten.").

208. Tadic Opinion, *supra* note 201, ¶ 175.

209. Meakic Indictment, *supra* note 199, ¶¶ 22.2, 22.5, 22.8, 22.11, 22.14, 25.2, 26.2, 30.2. Article 2(c) of the Tribunal Statute, entitled Grave Breaches of the Geneva Conventions of 1949, authorizes the International Tribunal to prosecute individuals for "wilfully causing great suffering or serious injury to body or health." *Tribunal Statute*, *supra* note 190, art. 2(c), at 36.

210. Meakic Indictment, *supra* note 199, ¶¶ 22.3, 22.6, 22.9, 22.12, 22.15, 25.3, 26.3, 30.3. Article 3, Violations of the Laws or Customs of War, provides a non-exclusive set of violations relating to suffering or destruction imposed upon civilians or civilian property. *See Tribunal Statute*, *supra* note 190, art. 3, at 37.

211. Meakic Indictment, *supra* note 199, ¶¶ 22.4, 22.7, 22.10, 22.13, 22.16, 25.4, 26.4, 30.4. Article 5(g), Crimes Against Humanity, authorizes the prosecution of rape. *Tribunal Statute*, *supra* note 190, art. 5(g), at 38.

of the nature of the injury with the charges filed in connection with the torture of men at the Omarska camp. According to the indictment, Serb soldiers fatally beat male prisoners for using Muslim expressions,[212] stripped male prisoners to their underwear, kicked them in the testicles, and beat them in the ribs until they became unconscious.[213] Soldiers ordered other prisoners to drink water like animals from puddles on the ground and later discharged a fire extinguisher into the mouths of those prisoners.[214] Like the prosecutions involving female victims, the Prosecutor charged offending soldiers with Grave Breaches under Article 2(c) (wilfully causing great suffering or serious injury to body or health),[215] and Violations of the Law or Customs of War under Article 3.[216] But instead of charging a violation of Article 5(g) (rape), the Prosecutor alleged a Crime Against Humanity for "other inhumane acts" under Article 5(i).[217]

Thus, the torture and humiliation of female prisoners by raping them was prosecuted as "wilfully causing great suffering or serious injury to body or health" and rape, but the torture and humiliation of male prisoners, even when it involved the genitals, was prosecuted as "wilfully causing great suffering or serious injury to body or health" and the residual category for "other inhumane acts." This differential is even greater exemplified by the indictment in the Tadic case.

The Tadic prosecution relates to the well-publicized atrocities committed against Muslim Croats at Omarska. As in the Meakic indictment, the Tadic indictment includes allegations of sexual and non-sexual violence against civilian prisoners in the camp. Just as in the Meakic indictment, in the allegations relating to the rape of a woman "F" at Omarska, the defendant is charged with committing a Crime Against Humanity under Article 5(g) (rape) of the Tribunal Statute.[218] However, the charges associated with sexual violence involving men exemplifies a different approach. The Tribunal found that the defendants beat a male prisoner named Harambasic, after which they ordered two male prisoners

212. Meakic Indictment, *supra* note 199, ¶ 27.1.

213. *Id.* ¶ 29.1.

214. *Id.* ¶ 31.1.

215. *Id.* ¶¶ 29.2, 31.2.

216. *Id.* ¶¶ 29.4, 31.4.

217. *See id.* ¶¶ 29.4, 31.4. Article 5(i), Crimes Against Humanity, authorizes prosecution for "other inhumane acts." *Tribunal Statute*, *supra* note 190, art. 5(i), at 38.

218. *Compare* Tadic Initial Indictment, *supra* note 203, ¶¶ 4.1–.4 (charging violations of Article 2(c) (wilfully causing great suffering), Article 3, and Article 5(g) (rape)), *with* Meakic Indictment, *supra* note 199, ¶¶ 22.1–.4 (charging the same violations). The amended Tadic indictments substituted a violation of Article 2(b) (inhuman treatment) for the initial Article 2(c) (wilfully causing great suffering) charge of the Tadic Initial Indictment. *See* Tadic Second Amended Indictment, *supra* note 200, ¶ 5, count 2. The charges associated with this rape of a woman were eventually dropped at trial. *See* Tadic Opinion, *supra* note 201, ¶ 37 (noting the withdrawal of the charges associated with paragraph 5 of the Second Amended Indictment which corresponds to paragraph 4.1 of the initial indictment).

to lick his buttocks and suck his penis, and then to bite his testicles.[219] As stated by the Tribunal:

> Meanwhile a group of men in uniform stood around the inspection pit watching and shouting to bite harder. . . . Witness H was threatened with a knife that both his eyes would be cut out if he did not hold Fikret Harambasic's mouth closed to prevent him from screaming; G was then made to lie between the naked Fikret Harambasic's legs and, while the latter struggled, hit and bit his genitals. G then bit off one of Fikret Harambasic's testicles and spat it out and was told he was free to leave. . . . Harambasic has not been seen or heard of since.[220]

For this conduct, the Prosecutor charged Tadic with a Grave Breach under Article 2(b) (torture or inhuman treatment),[221] a Violation of the Laws or Customs of War under Article 3 (cruel treatment),[222] and a Crime Against Humanity under Article 5(i) (other inhumane acts) of the Tribunal Statute.[223] Although the Presiding Judge at turns referred to the above-described conduct as a sexual assault[224] and sexual mutilation,[225] Tadic was not charged with violating Article 5(g) of the Statute (rape), even though the conduct included forced fellatio and other sex-based violence.

Five months after issuing the indictments in the Tadic and Meakic cases, the Tribunal issued five more indictments,[226] three of which contained allegations of sex-related violence.[227] These indictments evidence an evolution in the form in which the Prosecutor's office drafted its

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219. Tadic Initial Indictment, *supra* note 203, ¶ 5.1; *see also* Tadic Second Amended Indictment, *supra* note 200, ¶ 6.

220. Tadic Opinion, *supra* note 201, ¶ 206.

221. Tadic Initial Indictment, *supra* note 203, ¶¶ 5.29, 5.32.

222. *Id.* ¶¶ 5.21, 5.24.

223. *Id.* ¶¶ 5.31, 5.34. In the amended indictments, Tadic was charged with, among other things, violations of Article 2(b) (torture or inhuman treatment), Article 2(c) (wilfully causing great suffering or serious injury to body and health), Article 3 (cruel treatment), and Article 5(i) (inhumane acts). *See* Tadic Second Amended Indictment, *supra* note 200, ¶ 6, counts 8–11. Tadic was eventually found guilty of violating Articles 3 and 5(i) of the Tribunal Statute, but the Tribunal found the evidence did not overcome the reasonable doubt standard for the Article 2 charges. *See* Tadic Opinion, *supra* note 201, ¶¶ 237, 719–30.

224. *See* Tadic Opinion, *supra* note 201, ¶¶ 222, 231.

225. *See id.* ¶¶ 45, 231.

226. *See* Prosecutor v. Karadzic, Case No. IT-95-5 (ICTY July 25, 1995); Prosecutor v. Martic, Case No. IT-95-11 (ICTY July 25, 1995); Prosecutor v. Sikirica, Indictment, Case No. IT-95-8, ¶ 19 (ICTY July 21, 1995) [hereinafter Karaterm Indictment]; Prosecutor v. Miljkovic, Indictment, Case No. IT-95-9, ¶ 31 (ICTY July 21, 1995) [hereinafter Bosanski Samac Indictment]; Prosecutor v. Jelisic, Indictment, Case No. IT-95-10 (ICTY July 21, 1995) [Brcko Initial Indictment], *amended by* Prosecutor v. Jelisic, Amended Indictment, Case No. IT-95-10-PT (ICTY Mar. 3, 1998) [hereinafter Brcko First Amended Indictment] *and* Prosecutor v. Jelisic, Second Amended Indictment, IT-95-10-PT (ICTY Oct. 19, 1998).

227. *See* Karaterm Indictment, *supra* note 226, ¶¶ 19, 20 (forcing victims to engage in fellatio); Bosanski Samac Indictment, *supra* note 226, ¶ 31 (forcing two individuals to "perform sexual acts on each other"); Brcko Indictment, *supra* note 226, ¶ 33 (forcing two brothers to "perform sexual acts on each other").

pleadings, as well as a shift in the substantive manner in which atrocities involving rape, forced sex, and other forms of sex-related torture were prosecuted. These changes better represent, to my mind, the complex ways in which sex figured in the torture, humiliation, and inhumane treatment of both women and men in the war in the former Yugoslavia. What is more, the approach now used by the Prosecutor's office in dealing with sex-related violence, shaped in no small part by the work of Tribunal adviser for gender-related issues, Patricia Sellers,[228] provides a helpful model as an alternative to the more essentializing and static ways in which the New York Penal Law, for instance, categorizes certain behavior as a sex crime.[229]

While sex-related atrocities make up a significant part of the Prosecutor's docket, they are not prosecuted as sex crimes per se, but instead as the *actus reus* of other crimes, such as Crimes Against Humanity, Grave Breaches, Genocide, or Violations of the Laws and Customs of War. This mode of charging these crimes, together with the Tribunal's Rules of Procedure and Evidence that reflect a sensitivity to the unique issues that arise in the prosecution of sex-related violence,[230] make for a juridical structure that at once acknowledges the way in which sex operates as "an especially dense transfer point for relations of power"[231] without over-sexualizing rape and other sexual violence.

In the indictments issued in July 1995, the Prosecutor's office for the first time adopted the use of headings within which various counts were organized, such as, "Genocide," "Killing of [X]," "Torture of [Y]," "Beatings of [Z]," and "Sexual Assault."[232] These headings represent not only a change in form, but an evolution in the substantive manner in

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228. Formerly Legal Advisor for Gender-Related Crimes at the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and now ICTY prosecutor in the Hague.

229. *See supra* notes 131–51 and accompanying text (discussing New York penal law's treatment of sex crimes).

230. *See* INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991: RULES OF PROCEDURE AND EVIDENCE 96, U.N. Doc. IT/32/Rev.13 (1998) [hereinafter TRIBUNAL RULES OF PROCEDURE], *reprinted in* 33 I.L.M. 484, 535 (1994), *available at* <http://www.un.org/icty/basic/rpe/rev13e.htm> (visited Sept. 2, 1998). Rule 96 of the *Tribunal Rules of Procedure*, "Evidence in Cases of Sexual Assault" states:

> In cases of sexual assault:
> (i) no corroboration of the victim's testimony shall be required;
> (ii) consent shall not be allowed as a defence if the victim
> (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
> (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
> (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
> (iv) prior sexual conduct of the victim shall not be admitted in evidence.

*Id.*

231. FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3, at 103.

232. *See, e.g.*, Brcko Indictment, *supra* note 226.

which the Tribunal prosecuted sex-based violence. The Brcko indictment, for instance, charged that Ranko Cesic forced two brothers at gunpoint, "to beat each other and perform sexual acts on each other in the presence of others, causing them great humiliation and degradation."[233] For this conduct, the Prosecutor charged Cesic with a violation of Article 2(b) (inhuman treatment), Article 3 (humiliating and degrading treatment) and Article 5(g) (rape, which includes other forms of sexual assault) of the Tribunal Statute.[234] Two important changes are worth noting in this indictment. First, Crimes Against Humanity as set forth in Article 5(g) was interpreted for the first time to include not only rape, but also "other forms of sexual assault."[235] Second, the sexual assault of a man by a man was determined to constitute a sexual assault within the meaning of Article 5(g) rather than a generalized inhumane act under Article 5(i).[236]

In a separate indictment issued in July 1995, in connection with atrocities committed in the town of Bosanski Samac, Serbian soldiers were charged with forcing two male prisoners "to perform sexual acts upon each other in the presence of several other prisoners and guards."[237] For these allegations the Tribunal indicted the accused under the same violations of humanitarian law as the Brcko defendants—among other things, Crimes Against Humanity under Article 5(g) (rape, which includes other forms of sexual assault).[238]

In two indictments issued in 1996, the Prosecutor developed an even more refined approach to the prosecution of conduct that included some

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233. *Id.* ¶ 33.

234. *Id.* ¶ 33, counts 50–52. The Amended Indictment, issued March 3, 1998, eliminated the Article 2(b) charge. *See* Brcko Amended Indictment, *supra* note 226, ¶ 32, counts 34–35.

235. Brcko Initial Indictment, *supra* note 226, ¶ 33, count 52 (charging a "Crime Against Humanity recognized by Article 5(g) (rape, which includes other forms of sexual assault) of the Tribunal Statute").

236. The reform of indictment policy evidenced in the Brcko indictment, however, was not consistently implemented by the Prosecutor's office. *Compare id.* (charging violation of Article 5(g) (rape, which includes other forms of sexual assault) when defendants allegedly forced two brothers to perform sexual acts on each other), *with* Tadic Initial Indictment, *supra* note 203, ¶¶ 5.1, 5.31, 5.34 (charging violation of Article 5(i) (other inhuman acts) when defendants forced two individuals to "lick [a victim's] buttocks and genitals and then to sexually mutilate [the victim]"). In another indictment issued the same day as the Brcko indictment, the Prosecutor charged several Serbian soldiers with forcing a man to engage in "degrading, humiliating and/or painful acts, such as lying on broken glass, repeatedly jumping from a truck, and engaging in fellatio." Karaterm Indictment, *supra* note 226, ¶ 19. For this conduct, the defendants were charged with committing great suffering under Article 2(c), cruel treatment under Article 3, and inhumane acts under Article 5(i), but not rape or sexual assault under Article 5(g). *See id.* ¶¶ 19.2.1–.2.3. Male soldiers were similarly charged in a separate count for forcing a male prisoner to run while carrying a heavy machine gun and to engage in fellatio. *Id.* ¶ 20. The Karaterm indictment did not contain the subject headings contained in the Brcko and other indictments issued in July 1995.

237. Bosanski Samac Indictment, *supra* note 226, ¶ 31.

238. Like the Brcko defendants, the Bosanski Samac defendents were charged with a Grave Breach under Article 2(b) (inhuman treatment), Violation of the Laws or Customs of War under Article 3 (humiliating and degrading treatment), and a Crime Against Humanity under Article 5(g) (rape, which includes other forms of sexual assault). *Id.* ¶ 31, counts 36–38; *see supra* note 234 (describing the charges against the Brcko defendants, including subsequent amendments).

degree of sex-related violence. Continuing the use of subject headings in the indictments, in March 1996, the Prosecutor issued an indictment in connection with atrocities committed in a camp in the village of Celebici.[239] One allegation charges that Hazim Delic, the commander of the Celebici camp, forced a female prisoner to repeated forcible sexual intercourse, sometimes in public and other times by more than one rapist.[240] In a separate allegation, he was charged with raping another female prisoner during her first interrogation, and then every few days for the next six weeks.[241] For these actions, Delic was charged with a Grave Breach under Article 2(b) (torture), and Violations of the Laws and Customs of War under Article 3 (torture) and (cruel treatment).[242] This is the first time that the ICTY Prosecutor characterized sex-related violence against either a man or a woman, as torture, not rape.[243]

Further, the Tribunal issued an indictment in June 1996 in which rape, sexual enslavement, and other forms of sexual assault made up the central focus of the charges.[244] In the Foca indictment, the Tribunal described how, between April and July 1992, soldiers detained young and adult Muslim women of the town of Foca in houses, athletic fields, the local high school, detention centers, apartments, and houses.[245] Both individuals and groups of Serbian soldiers systematically raped, tortured, and humiliated these women.[246] On several occasions, the soldiers told women, while raping them, that they would give birth to Serbian babies,[247] and in one case, that her body "would be found in five different countries if she told anyone that he had raped her."[248] In addition, the indictment describes how many Muslim women were enslaved in houses and apartments converted into "rape camps,"[249] and were subjected to

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239. Prosecutor v. Delalic, Indictment, Case No. IT-96-21 (ICTY Mar. 21, 1996) [hereinafter Celebici Indictment].

240. *Id.* ¶ 24.

241. *Id.* ¶ 25.

242. *Id.* ¶ 24, counts 18–20; *id.* ¶ 25, counts 21–23.

243. It is very possible that the Prosecutor did not include a charge of Crime Against Humanity under Article 5(g) (rape) because she did not feel that she had sufficient evidence to prove that the rapes were committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial, or religious grounds.

244. Prosecutor v. Gagovic, Indictment, Case No. IT-96-23 (ICTY June 26, 1995) [hereinafter Foca Indictment].

245. *Id.* ¶¶ 5.1, 6.1, 7.1, 9.1, 10.1, 11.1, 12.1.

246. One victim was gang-raped for three hours by at least fifteen men, then sexually abused in "all possible ways," including having a soldier threaten to cut off her breast with a knife. *Id.* ¶ 9.10. Another victim was gang-raped by at least eight men, during which time one man bit her nipples to the point of bleeding, and then another squeezed and pinched her breasts while he raped her. She then lost consciousness from the pain. *Id.* ¶ 9.11. While one other victim was being raped by a male soldier, the soldier threatened to cut off her arms and legs and take her to church to be baptized. *Id.* ¶ 9.15.

247. *Id.* ¶¶ 9.3, 9.13.

248. *Id.* ¶ 8.1.

249. For the use of the term, see AMNESTY INT'L, BOSNIA-HERZEGOVINA: RAPES AND SEXUAL ABUSE BY THE ARMED FORCES 10–12 (1993); Roy Gutman, *Rape Camps: Evidence Serb Leaders in*

rape and other sexual assaults continually.[250] These women were also forced to perform domestic duties for the Serbian soldiers such as cooking, laundry, and cleaning,[251] and were bought and sold by Serbian and Montenegrin soldiers.[252]

The Prosecutor indicted eight Serbs for these crimes.[253] Where women were alleged to have been raped and tortured individually, rather than in "rape camps," the Prosecutor placed the allegations under the heading "Torture and Rape" and charged the defendants with Grave Breaches under Article 2(b) (torture), Violations of the Laws or Customs of War under Article 3 (torture) and Crimes Against Humanity under Article 5(f) (torture) and 5(g) (rape).[254] Allegations of rape, with no additional allegations of actual or threatened violence, such as cutting or biting, appeared under the heading "Rape" and the defendants were charged only with a Crime Against Humanity under Article 5(g) (rape), but not with a Grave Breach (torture).[255] Finally, allegations involving "rape camps," appeared under the heading "Enslavement and Rape," and the Prosecutor charged the defendants with Crimes Against Humanity under Article 5(c) (enslavement) and 5(g) (rape), Grave Breach under Article 2(b) (inhumane treatment), and Violations of the Laws and Customs of War under Article 3 (outrages to personal dignity).[256] Why this conduct was not characterized as torture is curious. Similarly puzzling is the prosecutor's decision in the Foca indictment to abandon the descriptions of acts charged under Article 5(g) as "rape, which includes other forms of sexual assault."

Finally, in the Kovacevic indictment,[257] the Prosecutor charged two Serbian officials with Genocide in connection with the torture of Muslim men and women in the towns of Prijedor and Banja Luka.[258] While the indictment enumerated the rape and torture of women and girls by subordinates of the named defendants, they were not charged with rape under Article 5(g), but rather with Genocide under Articles 4 and 7.[259] The indictment was later amended to charge the defendants with crimes

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*Bosnia OKd Attacks*, NEWSDAY, April 19, 1993, at 5; Maggie O'Kane, *Bosnia Crisis: Forgotten Women of Serb Rape Camps*, GUARDIAN, Dec. 19, 1992, at 9; Tom Post, *A Pattern of Rape*, NEWSWEEK, Jan. 4, 1993, at 32.

250. Foca Indictment, *supra* note 244, ¶¶ 10.1–.7, 12.1–.4.

251. *Id.* ¶¶ 10.6, 12.1.

252. *Id.* ¶ 12.5.

253. *Id.* ¶¶ 2.1–.8 (discussing the accused).

254. *See id.* ¶¶ 8.1–.2, counts 32–35; *id.* ¶¶ 9.1–9.26, counts 36–55.

255. *See id.* ¶¶ 11.1–.3, count 60.

256. *See id.* ¶¶ 12.1–12.6, counts 61–62.

257. Prosector v. Drljaca, Initial Indictment, Case No. IT-97-24-I (ICTY Mar. 13, 1997) [hereinafter Kovacevic Initial Indictment] (naming Drljaca and Kovacevic as defendants), *amended by* Prosector v. Kovacevic, Amended Indictment, Case No. IT-97-24-I (Jan. 28, 1998) [hereinafter Kovacevic Amended Indictment].

258. Kovacevic Initial Indictment, *supra* note 257, ¶¶ 9–16, count 1.

259. *Id.*

Against Humanity, Violations of the Laws or Customs of War, and Grave Breaches.[260] In this case, rapes and other forms of sexual assault comprised the predicate acts of Genocide, but not a substantive violation of international humanitarian law.

Thus, over time, the manner in which the ICTY Prosecutor's office framed sex-related violence has shifted. At the outset, the Prosecutor interpreted sex-related violence to amount to a Grave Breach, a Violation of the Laws and Customs of War, and a Crime Against Humanity.[261] However, violence suffered by women was pled as rape under the Statute's Crimes Against Humanity provisions,[262] whereas sex-related violence suffered by men was prosecuted under the provision reaching other inhumane acts.[263] After a period of time, rape, a crime specifically enumerated as a Crime Against Humanity in the Statute, was interpreted broadly to mean sexual assault, "an 'umbrella phrase' that refers to . . . forcible sexual penetration, indecent assault, enforced prostitution, sexual mutilation, forced impregnation, and forced maternity."[264] Thus, charges now brought under Article 5(g) are frequently described as "rape which includes other forms of sexual assault."[265] This expanded term has been applied to the rape of women as well as to men who were forced to perform sex acts, whether it be forced sexual intercourse or forced fellatio.[266]

What is more, the ICTY Prosecutor has come to regard sex-related violence as not only a sexual assault under Article 5(g), but as a form of torture and genocide—whether committed against men or women. "This is done by prosecuting sexual assaults not as enumerated crimes in and of themselves (such as under Article 5(g)), but rather as elements, usually the actus reus, of the crimes."[267] Thus, borrowing the definition from other conventions on torture, the ICTY Prosecutor defines torture, in relevant part, as:

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260. Kovacevic Amended Indictment, *supra* note 257, ¶¶ 33–57, counts 3–15.

261. *See* Meakic Indictment, *supra* note 199, ¶¶ 22.1–22.16, 25.1–25.4, 26.1–26.4, 30.1–30.4; Tadic Initial Indictment, *supra* note 203, ¶¶ 5.1, 5.29–.34; *see also* discussion *supra* notes 206–17, 218–25 and accompanying text (discussing the Meakic and Tadic charges).

262. *See* Meakic Indictment, *supra* note 199, ¶¶ 22.4, 22.7, 22.10, 22.13, 22.16, 25.4, 26.4, 30.4; Tadic Initial Indictment, *supra* note 203, ¶¶ 4.1–4.4; *see also* discussion *supra* notes 206–11, 213 and accompanying text (discussing the Meakic and Tadic charges as applied to female victims).

263. *See* Meakic Indictment, *supra* note 199, ¶¶ 29.4, 31.4; Tadic Initial Indictment, *supra* note 203, ¶¶ 5.31, 5.34; *see also* discussion *supra* notes 213–17, 219–25 accompanying text (discussing the Meakic and Tadic charges as applied to male victims).

264. Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & COMTEMP. PROBS. 45, 51 (1997); *cf.* TRIBUNAL RULES OF PROCEDURE, *supra* note 230, at Rule 96 (use of "sexual assualt" in Rule 96, as opposed to "rape," indicates Tribunal's intent to interpret Artilce 5(g) broadly).

265. *See, e.g.*, Brcko Indictment, *supra* note 226, ¶ 33, count 52; *see also* discussion *supra* note 235.

266. *See, e.g.*, Foca Indictment, *supra* note 244, ¶¶ 11.1–.3, count 60 (applying Article 5(g) to rape of four women); Brcko Initial Indictment, *supra* note 226, ¶ 33, count 52 (applying Article 5(g) to men forced to perform sexual acts on each other).

267. Sellers & Okuizumi, *supra* note 264, at 57–58.

> [A]ny act by which severe pain or suffering, whether physical or mental, is inflicted on a person for such purposes as . . . punishing him for an act that he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.[268]

Sexual assault is therefore regarded as an element of the crime of torture—as an act by which severe pain and suffering, whether physical or mental, is inflicted upon a person for a prohibited purpose. This view mirrors that of the U.N. Special Rapporteur on torture, who called rape "an especially traumatic form of torture."[269] Thus, evidence of rape or other sexual assault "only partially satisfies the elements of torture . . . which in turn only partially satisfies the elements required to establish a grave breach."[270] The evolution in the manner in which sex-related violence is charged before the ICTY has culminated in two judg-

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268. *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, art. 1, G.A. Res. 39/46, U.N. GAOR 3d Comm., 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984); *see* C.P.M. Cleiren & M.E.M. Tijssen, *Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues*, 5 CRIM. L.F. 471, 492 (1994).

269. *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1992/32*, U.N. ESCOR, 50th Sess. ¶ 19, U.N. Doc. E/CN.4/1995/34. The 1949 Geneva Conventions, which now constitute the core rules of international humanitarian law applicable in international armed conflicts, do not enumerate rape as a grave breach. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 147, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 287, 388 [hereinafter Geneva Convention] (including "wilful killing, torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health" as grave breaches). However, the International Commission of the Red Cross and the U.S. State Department have declared that Grave Breach under Article 147 (relating to "torture or inhumane treatment") encompasses rape. *See* Simon Chesterman, *Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 299, 331 & n.199 (1997) (citing Theodor Meron, Editorial Comment, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426–27 (1993) (quoting INT'L COMM. OF THE RED CROSS, AIDE-MEMOIRE (Dec. 3, 1992)) and *Final Report*, *supra* note 185, ¶ 105).

270. Sellers & Okuizumi, *supra* note 264, at 62. The Trial Chamber has determined that the elements of torture in an armed conflict require that torture:

> (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
> (ii) this act or omission must be intentional;
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
> (iv) it must be linked to an armed conflict;
> (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority—wielding entity.

Prosecutor v. Furundzija, Judgment, Case No. IT-95-17/1-PT, ¶ 162 (ICTY Dec. 10, 1998) [hereinafter Furundzija Judgment]; *see also* Prosecutor v. Tadic, Prosecutor's Pre-Trial Brief, Case No. IT-94-I-T (ICTY Apr. 10, 1995). To prove a Grave Breach, the Prosecutor must show (1) that the act was undertaken during "armed conflicts of an international character," and (2) that the victim was a person "regarded as 'protected,' in particular civilians in the hands of a party to a conflict of which they are not nationals." Tadic Opinion, *supra* note 201, ¶ 559.

ments issued by the Tribunal's Trial Chamber in cases involving charges of rape and other forms of sexual assault. In the Celebici case,[271] three military officials, two Muslims and a Croat, were convicted of having committed a number of war crimes, including rape of female prisoners,[272] placing burning fuses around the genital areas of male prisoners,[273] and forcing brothers to perform fellatio on one another.[274] In the Furundzija case,[275] the trial chamber convicted the defendant of aiding and abetting the rape and sexual assault of a female prisoner by a soldier in Furundzija's command while he looked on and did nothing.[276]

In both these cases, the judges were careful to thoroughly discuss the manner in which sexual assaults, including rape, were used as a form of torture. In order to make out a claim of torture, the prosecutor must show the intentional infliction of severe physical or mental pain or suffering undertaken for a prohibited purpose.[277] According to the Celebici panel, "it is difficult to envisage circumstances in which rape . . . could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation."[278] With regard to the specific sexual assaults with which the defendants were charged, the panel concluded that "the violence suffered by [female prisoners] in the form of rape, was inflicted upon her by Delic because she is a woman. [T]his represents a form of discrimination which constitutes a prohibited purpose for the offence of torture."[279] Similarly, the Furundzija panel concluded that the Prosecutor had proved that the rape of the female prisoner was a form of torture because they inflicted this form of severe physical and mental suffering in order to obtain information from her during an interrogation.[280] It is worth noting that the man who raped the victim in the Furundzija case had warned another soldier "not to hit her as he had 'other methods' for women, methods which he then put to use."[281] Thus, the Furundzija panel could have concluded that the rapes and other sexual assault of the female prisoner were conducted for a discriminatory purpose as well as for the purpose of extracting information.

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271. Celebici Judgment, *supra* note 184.

272. *Id.* ¶¶ 925–65, counts 18–23.

273. *Id.* ¶¶ 1035–48.

274. *Id.* ¶¶ 1060–66, counts 44–45.

275. Furundzija Judgment, *supra* note 270.

276. *Id.* ¶¶ 264–75. The man accused of assaulting the female victim in this case was charged with "rubb[ing] his knife on the inner thighs of [the victim] and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation." *Id.* ¶ 264. Subsequently, she was vaginally, anally and orally raped by the same man as part of the interrogation while Furundzija watched and interrogated her as well as other prisoners. *Id.* ¶ 266–67.

277. *See* Celebici Judgment, *supra* note 271, ¶¶ 452–97; Furundzija Judgment, *supra* note 270, ¶¶ 165–86.

278. Celebici Judgment, *supra* note 271, ¶ 495.

279. *Id.* ¶ 941.

280. Furundzija Judgment, *supra* note 270, ¶ 267.

281. *Id.* ¶ 87 (footnote omitted).

This shift to treating sex-related violence, including rape, as torture under Article 2(b) pertaining to Grave Breaches, is a position that Professor Rhonda Copelon has urged to the Prosecutor both directly in correspondence[282] and indirectly in her scholarly publications.[283] Her reasoning for doing so is threefold. First, Copelon argues, it is most appropriate to classify rape and other sexual assault as a Grave Breach, because "[u]nder the Geneva Conventions, the most serious war crimes are designated as 'grave breaches.'"[284] Second, to prove a Grave Breach, one need not show that the conduct was systematic or took place on a mass scale; "one act of rape is punishable,"[285] just as one act of murder or torture would be. Finally, crimes classified as Grave Breaches are conferred universal jurisdiction, thereby providing authority for the prosecution of such crimes before an international tribunal.[286] Thus, Copelon and others urge the prosecution of rape and other sex-related crimes as a form of torture in order to remove any ambiguity as to the seriousness of the offense.[287] The Prosecutor and the Trial Chambers have adopted this strategy not as a matter of amendment of the Statute, but as a matter of interpretation: The Grave Breach provisions of Article 2(b) pertaining to torture have now been interpreted by the Trial Chamber to include the rape of women in the Lasva River Valley[288] and at Celebici.[289]

What the ICTY Prosecutor has devised, in effect, is a strategy to evaluate on a case-by-case basis what role sex-related violence plays in the context of violations of international humanitarian law, in so far as it "shock[s] the conscience of humankind to such a degree [that it has] an international effect."[290] Rather than rely upon special laws that isolate rape and/or sexual assault as a privileged kind of injury, the Tribunal's Prosecutor and judges have chosen to tailor the construction of these crimes to the way in which sex-related violence figured in the physical or mental destruction of a people or person. Where sex-related violence takes place on a mass scale, or is the subject of orchestrated policy, then it is appropriately prosecuted as a Crime Against Humanity, which requires a showing that the accused's actions were part of a widespread or

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282. *See* Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 253–54 & n.46. (1994) (describing communications between Rhonda Copelon and the Chief Prosecutor of the ICTY).

283. *See id.* at 248–57 (arguing for the prosecution of rape as a Grave Breach under Article 2(b) of the Tribunal Statute (torture)).

284. *Id.* at 249.

285. *Id.* at 250.

286. *Id.*

287. *See, e.g.*, Chesterman, *supra* note 269, at 327; Copelon, *supra* note 282, at 248–57; Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 685 n.108 (1996); Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 29 AMER. U. L. REV. 793, 818 (1997).

288. Furundzija Judgment, *supra* note 270, ¶¶ 264–69.

289. *See* Celebici Indictment, *supra* note 239, ¶¶ 24–25, counts 18, 21.

290. Goldstone, *supra* note 198, at 228.

systematic attack against a civilian population.[291] Where it operates as part of a campaign to destroy a national, ethnical, racial, or religious group, it should be prosecuted as Genocide.[292] Yet, as ICTY Judge Elizabeth Odio Benito observed, "it will be difficult to compile sufficient evidence to prosecute persons individually responsible for . . . crimes against humanity or genocide."[293] Thus the Tribunal can and should invoke its Statute's provisions relating to Grave Breaches and Violations of the Laws and Customs of War in cases involving sex-related violence as well.

All of these formulations are clearly preferable to the treatment of rape as a spoil of war, as a crime of passion or lust, or as a crime against honor, modesty, or dignity, as international humanitarian law has in the past.[294] While it is true that rape and other sex-related violence was undertaken in the former Yugoslavia systematically as part of a campaign of ethnic- and religious-based persecution,[295] it was also undertaken as part of a systematic campaign of gender-based persecution. International humanitarian law has begun to recognize the significance of gender-based persecution insofar as rape has been treated as a form of sex discrimination within the context of torture prosecutions. The ICTY Trial Chambers construction of rape as torture made a tremendous step beyond the view that "rape and other sexual assaults have often been labeled as 'private,' thus precluding them from being punished under national or international law.[296]

The same interpretative advance must be undertaken with respect to the meaning of Crimes Against Humanity. "The women victims and survivors in Bosnia are being subjected to crimes against humanity based on *both* ethnicity and religion, and gender. It is critical to recognize both and to acknowledge that the intersection of ethnic and gender violence has its own particular characteristics."[297] Thus, persecution based on gender must be recognized as its own class of crimes against humanity. It is important to be clear, however, that to do so is a quite different interpretive strategy than focusing on the role of sex in war.

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291. *See* Tadic Opinion, *supra* note 201, ¶ 626; Sellers & Okuizumi, *supra* note 264, at 57 n.47; Elizabeth Odio Benito, Rape and Other Sexual Assaults as War Crimes Prohibited by International Humanitarian Law 22 (Mar. 8, 1998) (unpublished manuscript, on file with author).

292. *See* Kovacevica Initial Indictment, *supra* note 258, ¶¶ 9–16; *Tribunal Statute*, *supra* note 190, art. 4, at 37.

293. Benito, *supra* note 291, at 12.

294. *See* Geneva Convention, *supra* note 269, art. 27, 6 U.S.T. at 3516, (declaring that women "shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault"); Rhonda Copelon, *supra* note 282, at 249.

295. *See Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission*, U.N. Comm'n on Human Rts., 50th Sess., Agenda Item 11(a), ¶ 268, U.N. Doc. E/CN.4/1995/42 (1994).

296. Celebici Judgment, *supra* note 271, ¶ 471.

297. Copelon, *supra* note 282, at 261.

The ICTY has for the first time treated sex-related violence as a serious, and often grave, breach of international humanitarian law, while avoiding the mistake of essentializing sexual conduct as a special kind of injury that deserves to be "protected, surrounded, invested"[298] with a unique legal response. The Tribunal's Rules of Procedure and Evidence reflect a sensitivity to the particularities of sex-related violence with respect to the corroboration of sexual assault victim's testimony, evidence of prior sexual conduct, and complexity of the notion of consent.[299] Indeed, the Trial Chamber rested its conviction in the Celebici case on the uncorroborated testimony of the rape victim.[300] Thus, the prosecution of sex-related violence before this Tribunal stands a good chance of being done in such a way that recognizes the way that sex was used as a weapon of war, yet avoids many of Foucault's concerns with respect to the ways in which sex is legally inscribed on the body. At the same time, this method of prosecution remains sensitive to particular meanings of sex-related violence for the people who suffered it, as well as for the larger culture in the former Yugoslavia.

## VI. CONCLUSION

Of course, all cultures sexualize different body parts and behaviors in myriad ways. In a sense, I am urging a reverse sociology of the erotic. Rather than study the ways in which fingers, toes, lips, ears, penises, vaginas, or anuses become eroticized across cultures, I am concerned with the way in which body parts and practices, once sexualized, cannot escape a signification process by which contact with those body parts and the enactment of those practices are always, already, and exclusively understood to be sexual. In this sense, I want to question whether the sexual is a satisfactory lens of analysis by which to understand the meaning of interpersonal practices such as sexual harassment, seminal practices in Melanesia, the assault of Abner Louima, or sex-related violence in the former Yugoslavia.

In the Tadic case, the Tribunal found that Suada Ramica, a Muslim woman who was three to four months pregnant as a result of being raped by a Serbian soldier in a camp, was

> taken to the Prijedor police station by a Serb policeman with whom she was acquainted through work. On the way he cursed at her, using ethnically derogatory terms and told her that Muslims should all be killed because they "do not want to be controlled by Serbian authorities." When she arrived at the police station she saw two Muslim men

298. FOUCAULT, POLITICS, *supra* note 15, at 202.

299. TRIBUNAL RULES OF PROCEDURE, *supra* note 230, Rule 96 (providing strict rules for the admission of testimony and limiting the defense of consent in cases of sexual assault); *see supra* note 230 (providing the full text of Rule 96). The Celebici defendants were convicted.

300. Celebici Judgment, *supra* note 271, ¶ 936.

> whom she knew, covered in blood. She was taken to a prison cell which was covered in blood and . . . raped again and beaten . . . .[301]

This evidence supported a finding by the Tribunal that Tadic was guilty of religious persecution—a Crime Against Humanity.[302] This evidence sounds eerily similar to Abner Louima's recount of the conduct and comments of the police officers who verbally and physically assaulted him on the night of August 19, 1997. Recall, the white police officers are accused of saying:

> "You niggers have to learn to respect police officers." The other one said, "If you yell or make any noise, I will kill you." Then one held me and the other one stuck the [wooden handle of a toilet] plunger up my behind. He pulled it out and shoved it in my mouth, broke my teeth and said, "That's your s—t, nigger." Later, when they called the ambulance, the cop told me, "If you ever tell anyone . . . I will kill you and your family."[303]

If what Suada Ramic experienced was sexual violence in the service of religious persecution, surely what Abner Louima suffered was sexual violence as a form of racial persecution. In both cases, the victims suffered a form of gender-based violence as well. Hopefully, international humanitarian law will one day recognize gender-based crimes as being on a par with crimes that are racial, religious, ethnic, or political in nature. But in either case, it would be a mistake to reduce the wrong of the atrocities they suffered to the fact that they were sexual. So too, when observers object to the ritualized semen practices of the Sambia because they amount to intergenerational sex, we lose sight of the power those practices have to teach boys important gender-based lessons. In all these cases, it is paramount that we keep our focus on how sex is put to work to construct men, masculinity, and nations, and to destroy women, men, and a people.

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301. Tadic Opinion, *supra* note 201, ¶ 470.
302. *Id.* ¶ 718.
303. McAlary, *supra* note 100, at 2.

# HUSBANDS & WIVES, DANGEROUSNESS & DEPENDENCE: PUBLIC PENSIONS IN THE 1860S–1920S

SUSAN STERETT*

## I. INTRODUCTION

Everyone needs a wife. That is, we all could use a person in our lives who fits the once-idealized image of a wife: doing the laundry, cooking, caring for children, arranging medical appointments, managing a social life, and attending to emotional needs. In this list of what makes one a wife in a marriage, the most established of heterosexual institutions, I have not included heterosexual intercourse. Heterosexuality entails much more than who is sexually involved with whom, and anyone who has ever said she needs a wife knows that.

The purpose of this article is to discuss meanings of heterosexuality in the context of state benefits, focusing on the emergence of benefits in the nineteenth century. Not only did the late-nineteenth century engender the emergence of state benefits alongside expanding state employment, but that period also fostered an understanding of heterosexuality or homosexuality as a characteristic of individuals, rather than a description of behavior. Appellate courts, when determining who could receive benefits, considered proper family roles in deciding whether people had earned state payments or could only gain them as a matter of charity.

Because an understanding of fixed sexual identities was just being created in the latter part of the nineteenth century, it is anachronistic to impose categories of heterosexuality on the state's evaluation of wife and husband. However, I am not trying to understand distribution of state benefits on its own terms, but rather as a way of addressing state definition of marriage.

Benefits programs merit examination for two reasons. First, by the 1890s federal civil war pensions comprised over forty percent of the federal budget.[1] Second, pensions premised upon post-retirement payment for services rendered constitute the ongoing model for pensions many workers today receive through employers and for old age social security payments. The latter part of the nineteenth century saw a significant reconstitution of governance, with states expanding civil service employment and changing from a format of segmented politics, in which those

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1. *See* Megan J. McClintock, *Civil War Pensions and the Reconstruction of Union Families*, 83 J. AM. HIST. 456, 458 (1996).

who specifically benefited paid for the benefits, to a system that assumed that state payments, when justified, benefit society as a whole.[2] As a result, states began to seriously and more explicitly examine the values of work and state benefits, which illuminated what it meant to serve society by emphasizing qualities of masculinity.

This article first discusses ambiguities in understanding what signifies heterosexuality and homosexuality. This article then examines the administration of Civil War pensions in the late-nineteenth century. The article closes with an analysis of decisions concerning the constitutionality of pensions.

## II. STRAIGHT AND QUEER

Adrienne Rich, in her generative article on compulsory heterosexuality,[3] argues that there is a lesbian continuum: that many women live rather closely with other women.[4] Women have friendships with other women, work with other women, gossip with other women, live with other women, share child care with other women, and are sometimes sexually involved with other women. It is only the latter that guarantees that one will be counted as lesbian; everything else is simply what we expect of all women in this culture. Rich's work implies two possible explanations for the fact that women's lives closely revolve around other women though most women identify as heterosexual. First, pressure to be heterosexual is so overwhelming that we simply cannot know how women would understand and define their sexuality without such pressure.[5] Alternatively, women are naturally and essentially lesbian, and that cultural heterosexuality requires the apparatus of social pressure and coercion to keep women from primarily sharing our lives with other women.[6] The latter reading suggests an essential sexuality, that there is no ambiguity and uncertainty in how one sexually identifies. Rich leaves unanswered the question of whether this structure is biologically or socially created: who wouldn't want to live with women? Rich argues that given the range and magnitude of social pressure to be straight, combined with the varied penalties for living primarily with other women, heterosexuality is compulsory.[7] Therefore, historically we can not know what sexual identity women would have chosen in the absence of wage

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2. *See generally* ROBIN EINHORN, PROPERTY RULES: POLITICAL ECONOMY IN CHICAGO 1833–1872 (1991) (discussing the evolvement of Chicago's economic policy).

3. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* THE LESBIAN AND GAY STUDIES READER 227 (Henry Abelove et al. eds., 1993).

4. *See id.* at 239.

5. *See id.* at 229.

6. *See id.* at 235.

7. *See id.* at 241.

disparities between men and women, societal discrimination, witch burnings, and patriarchal control of law, theology, and science.[8]

Recently, queer theory has attempted to shift the focus of sexual identity analysis away from an examination of the people for whom one feels sexual desire—which could include many different people—and those with whom one is sexually involved—which at any particular time could be no one.[9] The people we sexually desire or with whom we are sexually involved do not define or exhaust our whole lives. In recent popular culture, the wide variety of indicators of straightness or gayness have been noted, particularly with regard to gay men.[10] In a radio broadcast, Dan Savage discussed going to his first workshop on adoption after he and his boyfriend had decided to adopt.[11] The workshop began by urging couples to deal with their infertility, a problem common to many, but not all, heterosexual couples seeking adoptive children.[12] Savage noted that he and his boyfriend could have skipped this part of the orientation.[13] They had always accepted as fact that they could not biologically have children, rather than as something that ran counter to their expectations and visions of what their lives would be.[14] Both straight and gay couples could not conceive children without becoming entangled in a complicated arrangement with a third party to make one of the partners a biological parent. The language of the seminar about infertility, Savage argued, was the language of coming out.[15] Couples were urged to tell their friends and family of their situation, to accept what they could not change, and eventually see it as a positive, new way of making a family.[16] Just as the straight couples shared in an element of gayness, Savage argued he and his boyfriend were appearing a little bit straight by adopting a child and creating a nuclear family. Savage argued against seeing the desire to have children as gay or straight.[17]

If straight and queer are sometimes difficult to define, and if they blur, it might be useful to examine where and how the terms are made explicit. What is it that makes people straight or queer? How have legal

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8. *See id.* at 231.

9. *Cf.* Judith Butler, *Imitation & Gender Insubordination*, *in* INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 13 (Diana Fuss ed., 1991) (discussing the impossibility of defining "lesbian"); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1599–1601 (pointing out the limitations of defining homosexuality by sexual desire).

10. *See, e.g.*, IN AND OUT (Paramount 1997) (exploring the implications of stereotypically gay behavior); *see also Ellen* (ABC television broadcast, 1997) (drawing attention to lesbian existence).

11. *All Things Considered: Gay Adoption* (National Public Radio broadcast, Dec. 19, 1997) (transcript information available at <http://www.npr.org/inside/transcripts> (visited Sept. 4, 1998)) [hereinafter *Gay Adoption*].

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

institutions categorized sexuality? When these questions are addressed, it is usually in terms of homosexuality. Andrew Koppelman argues that discrimination against gays and lesbians should count as gender discrimination on two grounds.[18] First, this kind of discrimination rests upon the belief that it is wrong for a man to do things with a man that it would be acceptable to do with a woman.[19] This reasoning has worked, to the benefit of gays and lesbians, in the European Court of Justice (ECJ),[20] which has recently held that discrimination against transsexuals is prohibited by the sex discrimination provisions of the Equal Treatment Directive. According to the ECJ, a person who is fired because she is undergoing or has undergone gender reassignment is being treated unfavorably in comparison with people of the sex to which she was born.[21] English courts have subsequently referred a case to the ECJ involving discrimination against a gay man based on the belief that the case regarding transsexuals almost certainly outlaws all discrimination on the basis of sexual identity.[22]

Second, Koppelman argues discrimination on the basis of sexual orientation should also be considered gender discrimination because gay men are often the victims of discrimination for behavior that is considered stereotypically female.[23] They are discriminated against as though they are women, although perhaps more aggressively because behavior that might be accepted for women is unacceptable for men. Similarly, lesbians are discriminated against for behavior that would seem appropriate for men.[24] Koppelman also argues that "the two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other."[25] For example, in *Price Waterhouse v. Hopkins*,[26] a prominent sex discrimination case, a woman was denied partnership because she needed to go to charm school and did

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18. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

19. *Id.* at 219.

20. The ECJ is a supranational court that judges disputes arising within the fifteen-member European Union under European Community law. *See* SALLY J. KENNEY, FOR WHOSE PROTECTION? REPRODUCTIVE HAZARDS AND EXCLUSIONARY POLICIES IN THE UNITED STATES AND BRITIAN 78–83 (1992) (discussing the impact of the ECJ on British law). The Council of Ministers, which includes a representative from each member state, outlines directives that set objectives for the Union as a whole. *See id.* at 79–80. Directives allow member states choices in how to meet objectives. *See id.* The Equal Treatment Directive was enacted in 1976. *See id.* at 80.

21. *See* Case C–13/94, P v. S, 2 C.M.L.R. 247 (1996).

22. *See* R v. Secretary of State for Defence, *ex parte* Perkins, [1997] I.R.L.R. 297.

23. *See* Koppelman, *supra* note 18, at 202–03 (discussing how discrimination against homosexuals is part of the larger gender discrimination).

24. *Id.* at 245–46.

25. *Id.* at 235.

26. 490 U.S. 228 (1989) (superseded by 42 U.S.C. § 2000e–2 (1994) (making it unlawful for employers to classify employees or applicants for employment by race, color, religion, sex, or national origin in a way that would deprive that person of employment or adversely affect his or her status as an employee)).

not wear make-up.[27] Of course, women can also be discriminated against for seeming to be too feminine.[28]

Using the range of behaviors that constitute lesbian and gay identity as a basis for identifying someone as queer can work to put gay and lesbian identity at risk.[29] That is, a person can call herself queer without paying the public price of being explicitly paired with a same sex partner. Erasure does not have to be the only choice available in dismantling normative heterosexuality; as Suzanna Walters argues, it should be entirely possible for an individual to have a straight identity while being politically committed to equality with regard to sexual orientation.[30] Despite ambiguities in race and the recognition that race is not a sensible biological construct, we do not, as a matter of political and analytical argument, erase the categories of Black, White, Asian, and Latino.[31] Some queer theorists have emphasized "gender bending"[32] in sexual play, arguing that it is possible to have a queer heterosexuality in the sense that one might be heterosexually active while subverting standard gender norms of what it means to be feminine or masculine.[33] Such an argument gains strength as we note that an individual's sexuality is indeed marked in a number of ways in our culture.[34] Celia Kitzinger and Susan Wilkinson argue that the possibility of variety in sexual play does not mean that many people engage in it, and that few heterosexual women writing about sexuality believe that it is very possible to play with sexuality in a way that subverts gender norms.[35] They also argue that an emphasis on the range of play available to women who lead relatively privileged lives, who are less subject to financial and social pressures, ignores the compulsory nature of heterosexuality and straight gender norms that pervade the lives of many women.[36]

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27. *Price Waterhouse*, 490 U.S. at 235.

28. *See id.* at 251 (stating that stereotyping puts women in the intolerable position of never being able to advance).

29. *See generally* Suzanna Danuta Walters, *From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?)*, 21 SIGNS 830 (1996) (discussing the definitions of gay/lesbian issues and their effect).

30. *See id.* at 844–45.

31. *See id.* at 832–33.

32. *Cf.* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (illustrating that how effeminate men are regarded in society impacts the struggle against gender discrimination in general); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 30 (1995) (arguing that although the author is physically excluded from the category of lesbian, he includes himself to "poke at the sex/gender essentialisms that rigidly and absurdly confine us all").

33. *See* Eve Kosofsky Sedgwick, *Epistemology of the Closet*, *in* THE LESBIAN AND GAY STUDIES READER, *supra* note 3, at 45, 55.

34. *See generally id.* (discussing the concept of homosexuality through literature and culture).

35. *See* Celia Kitzinger & Susan Wilkinson, *Virgins and Queers Rehabilitating Heterosexuality?*, 8 GENDER & SOC'Y 444, 445, 457 (1994).

36. *See id.* at 459.

We could avoid the problem of erasing gay and lesbian identity by turning the focus to the markings of heterosexuality. Judith Butler writes in extraordinarily thought-provoking ways about confounding the fixed nature of sexual identity, but does not thereby suggest that identity is a matter of free play or that heterosexuality is not compulsory.[37] Instead, she argues for the importance of focusing on the masquerade of gender within heterosexuality rather than on lesbian identity.[38] The claim to a specific lesbian identity has been a "counterpoint to the claim that lesbian sexuality is just heterosexuality once removed, or that it is derived, or that it does not exist."[39] Claiming lesbian sexuality means accepting preconceived notions of lesbian identity, so that claiming lesbian identity is inherently accepting a subordinate status within a dominant heterosexuality, Butler bypasses the question of lesbian specificity, instead addressing the other half of the problem: the assumed authenticity of heterosexuality. She argues that "[c]ompulsory heterosexuality sets itself up as the original, the true, the authentic; the norm that determines the real implies that "being" lesbian is always a kind of miming . . . ."[40] An important move in queer theory would be to avoid the continued focus on what makes up a true lesbian identity in favor of trying to understand how heterosexuality is not natural, true, or essential.[41] If heterosexuality is not natural, true, or essential, then lesbianism cannot consequently be the tainted derivative of something true. Similarly, Lisa Duggan argues that focusing on the construction of gay and lesbian sexuality "tends to leave heterosexuality in its naturalized place."[42] Therefore, it is important to analyze the extent of heterosexual privilege established in law and public policy.[43] These approaches both avoid assuming an essential identity while at the same time refusing to focus on the range of play possible within heterosexuality—as Kitzinger and Wilkinson argue queer theory too often does.[44] Instead, the invitation is to focus on how ordinary heterosexuality is understood.

Butler's framework resolves some of the ambiguity in Rich's argument. It is simply not worth trying to determine if women's authentic sexuality rests with other women, as one reading of Rich would suggest. Instead, there is no true and authentic way to be gay, lesbian or straight, because all sexual identities are assumed. Butler argues:

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37. *See* Butler, *supra* note 9, at 21.

38. *Id.* at 17.

39. *Id.*

40. *Id.* at 20.

41. *Id.* at 20–21.

42. Lisa Duggan, *Queering the State*, 39 SOC. TEXT 1 (1994), *reprinted in* SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 179, 185 (Lisa Duggan & Nan D. Hunter eds., 1995) (subsequent citations to *Queering the State* will reference the article as reprinted in SEX WARS).

43. *See id.* at 186.

44. *See* Kitzinger & Wilkinson, *supra* note 35, at 458–59.

> There is no "proper" gender, a gender proper to one sex rather than another, which is in some sense that sex's cultural property. Where that notion of the "proper" operates, it is always and only *improperly* installed as the effect of a compulsory system. Drag constitutes the mundane way in which genders are appropriated, theatricalized, worn and done; it implies that all gendering is a kind of impersonation and approximation.[45]

If masculine characteristics do not naturally belong to men, and feminine characteristics do not naturally belong to women, we can attend to the work that goes into maintaining what are taken to be proper boundaries. However, analyses of compulsory heterosexuality in law have focused primarily upon sexual intercourse despite the range of ways sexuality and identities can be understood.[46]

Heterosexuality might be best understood by approaching it as a question of gender norms. Compulsory heterosexuality might not be primarily enforced via law regarding what constitutes sexual intercourse, but rather by what sets the context in which men and women are understood to be heterosexual. An analysis of the system of early benefit payments illustrates this point.

## III. STATE BENEFITS FOR DANGEROUS PUBLIC SERVICE

This article discusses two major points related to nineteenth-century state payments' effect on heterosexuality: first, that the practicalities of gaining state benefits enforced heterosexuality by requiring women to associate with men, and second, that the law surrounding state payments articulated and enforced a notion of the "proper."[47] Pension payments went to men whom courts identified as acting appropriately through definitions of dangerous work. That this work was a performance is enhanced by imagined dangerousness, regardless of whether the work actually placed the performer in physical jeopardy.

Analyzing the availability of state benefits clearly involves discussing compulsory heterosexuality: women had to associate or live with men in order to receive payments.[48] Whatever room for complexity there might have been in one's living arrangements, as a matter of legal recog-

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45. Butler, *supra* note 9, at 21.

46. *See generally* Richard Collier, *"The Art of Living the Married Life": Representations of Male Heterosexuality in Law*, 1 SOC. & LEGAL STUD. 543 (1992) (discussing how the law has used marriage to define a "natural" sexual intercourse); Elizabeth M. Iglesias, *Rape, Race, and Representation: the Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869 (1996) (discussing how society defines rape and its impact on women's sexuality).

47. *See* Butler, *supra* note 9, at 21 (addressing "compulsory" gender norms).

48. Indeed, normative heterosexuality is well-established enough that I doubt it would be possible to find a case of a man even trying to claim benefits on the basis of his affiliation with another man, separate from being a son or father; particularly since marriage or something that mimicked marriage was required to claim benefits and marriage was defined as a heterosexual union.

nition, heterosexuality was enforced. However, understanding the masculine characteristics that allowed for the state benefits is a slightly different matter. By focusing on masculinity, we address Butler's point that gender is appropriated and approximated rather than intrinsic.[49] In addressing masculinity, we are no longer addressing sexual orientation—at least in the sense of sexual desire or who must live with whom to get state benefits. Instead, gender, usually the category we use for discussing masculinity and femininity, subsumes sexual orientation. In other words, whom one desires sexually constitutes merely one aspect of a person's gender. Yet focusing on masculinity and femininity would seem to erase lesbian and gay identity—an ironic result given that the emergence of more fixed state regulatory apparatuses in the late-nineteenth century in part conditioned the emergence of sexual identity.[50]

The framework of sexual identity, or of queer theory, could as easily be said to encompass the framework of gender. That is, instead of saying that all of sexual orientation concerns masculinity and femininity, which is in turn about gender, we could say that all of gender is about signaling masculinity and femininity, which is in turn about sexual orientation. Feminist theory has argued there is no essential human being called "woman" who shares characteristics across all women.[51] Where there are patterns of shared outlooks and characteristics, they are dependent on race and class position, as well as sexuality.[52] The fragmentation of a subject called "woman" has come from the challenges raised by members of marginalized groups, and that includes challenges raised from queer theory. As Eric Heinze argues, transsexuals, who have been at the forefront of challenges to discrimination on the basis of sexual identity in the European supranational courts, raise the most explicit challenges to "categories, such as gender, race, ethnicity, nationality, religion or language, as well as non-categories, such as the 'human family' or the abstract individual."[53] If, for example, birth certificates are not changed to reflect a transsexual's new sex, then marriage for a transsexual is, from the point of view of the state, same-sex marriage.[54]

Heinze argues that while it might be analytically useful to separate out discourses of classical sexology, gender, and sexual orientation, and while their theoretical bases have different origins, disjoining these frameworks eventually shows how they overlap.[55] When these discourses

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49. *See* Butler, *supra* note 9, at 21.

50. I am grateful to Eric Heinze for bringing this point to my attention.

51. *See, e.g.*, ELIZABETH V. SPELMAN, INESSENTIAL WOMAN (1990) (recognizing that Western philosophy concerning "womanness" does not consider the vast, inherent differences of women).

52. *See, e.g.*, PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT (1991) (centering the analysis deliberately on African-American women).

53. Eric Heinze, *Discourses of Sex: Classical, Modernist and Post-Modernist*, 67 NORDIC J. INT'L L. 37, 72 (1998).

54. *See id.* at 68.

55. *See id.* at 40.

are separated, they are only so in their most polar versions; once one complicates an understanding of gender, one is quickly in the midst of discussions of queer theory. As Heinze puts it, "[f]or no sub-discourse within any of the three sites truly can be understood as irrelevant to the other two sites. Appearing, perhaps, to bypass ('disjoin') the other two sites, a disjunctive sub-discourse in fact collapses ('conjoins') these into itself."[56] Rather than this leading to the meaninglessness of the categories, Heinze argues that it would instead be useful to proliferate categories by joining them together.[57] He maps the discourse of sexual orientation onto postmodernist forms of knowledge, which emphasize the fragmentation of the legal subject.[58] He argues that the feminist project, in contrast, emerged more from the emphasis on programmatic modernism embodied in arguments for universal human rights.[59] Heinze also argues that the very artificiality of these conjunctions invites us to proliferate the categories: that it would be helpful to think about what it might look like to explore and link liberal, modernist, and postmodernist perspectives about gender, sexuality, and orientation.[60]

In a different context, that of understanding the conjunction of local with global, Donna Haraway also argues for the usefulness of using categories whose very artificiality is evident: it will keep us from deluding ourselves that we are discussing something real, concrete, and separable from everything else.[61] With these points in mind in the forthcoming discussion of the enforcement of heterosexuality in pensions law I do not mean to analyze which assumptions are about gender and which are about heterosexuality. I am not convinced they are wholly separable, though for some purposes the distinctions might be important. Instead, I argue that characteristics we would associate with gender, such as courage for men and dependence for women, concern sexual orientation. In court cases, the characteristics of socially gendered masculinity or femininity arose in situations where courts also assumed these characteristics to be important because men, women, and children were in heterosexual families, or should be.

In addressing masculinity, femininity, and assumptions about family, we do not resolve some questions, such as what it really means to be "straight," and if heterosexual desire ever authentically belongs to women. But in keeping with analyses that view sexuality as about much more than for whom one has sexual desires, we can analyze the maintenance in law of heterosexuality as a set of beliefs about how men and women should live together. These laws have enforced a normative het-

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56. *Id.* at 48–49.
57. *Id.* at 40.
58. *Id.* at 62–67.
59. *Id.* at 56–60.
60. *Id.* at 73–75.
61. Donna J. Haraway, *Reading Buchi Emecheta: Contests for "Women's Experience" in Women's Studies*, *in* SIMIANS, CYBORGS AND WOMEN 109, 111–13 (1991).

erosexuality, formalizing relationships that might have once been informal and more fluid.

While the law of state benefits enforced a heterosexual and monogamous version of family, it nonetheless allowed some social space for making things up as one went along. Legal categories did not regulate everything. To the extent that homosexuality was not identified as a quality of individuals until the late-nineteenth century in the United States,[62] women could and did arrange their lives so that they could live together with each other, and they could do so under very little public scrutiny or disapproval.[63] D'Emilio and Freedman discuss same sex couples who lived married lives between the 1850s and 1870s.[64] In each couple, one partner took on the position of husband or wife in a way that fit established heterosexual practices, but also took on a position different from what might have been signified by biological sex.[65] Butler's notion that all of gender is a "drag,"[66] even if it is not one that people can take off or put on at will, makes it difficult to say that the partnerships D'Emilio and Freedman describe are straight or gay/lesbian. To argue the latter imputes tremendous significance to biological sex and much less to what we take seriously in the social world. Furthermore, D'Emilio and Freedman argue that to impose categories of heterosexuality or homosexuality is exactly that: an imposition, because such categories were not common ways of categorizing people until the late-nineteenth century.[67]

In the nineteenth century, women could very rarely earn enough to support themselves.[68] Also, understandings of what it meant to be a proper wife were enforced even where married women earned their own wages; they were enforced in a way that made it difficult for women to protect their earnings from husbands.[69] Not until 1887 did most states have statutes protecting married women's access to their own wages.[70]

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62. JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 121 (1988); *see also id.* at 128–29 (discussing Walt Whitman as an example of nineteenth-century romance between same sex friends).

63. *See id.* at 121.

64. *Id.* at 124–27.

65. *See id.* at 127.

66. Butler, *supra* note 9, at 18–21.

67. *See* D'EMILIO & FREEDMAN, *supra* note 62, at 121, 123.

68. *See id.* at 124–25.

69. *See* Valentine v. Tantum, 32 A. 531, 531–32 (Del. Super. Ct. 1886), *cited in* Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 471 (1988) (outlining the state of women's property rights at common law prior to the enactment of the "Married Woman's Act" and noting that married women had no right to contract at common law).

70. *See, e.g.*, Act to Protect the Rights of Married Women, 1861 Colo. Sess. Laws 152, 152 ("[A]ny married woman, while married, may bargain, sell and convey her personal and real property, and enter into any contracts in reference to the same as if she were sole."); *see also* Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880,*

Indeed, many courts interpreted the statutes so that women could only keep their wages if they lived separately from their husbands.[71] They could not keep wages necessary for domestic duties, and where married couples mingled their incomes, the women lost title to their earnings and possessions.[72] "Taking in boarders, nursing the sick, canning fruit, working as a seamstress for five dollars a week, running a hotel—such enterprises were all deemed part of the domestic labor the wife owed as the 'helpmate of her husband.'"[73] If pensions were any kind of substantial contribution to earnings, the public enforcement of heterosexuality through pensions regulations allowed some financial freedom that could allow women a choice other than remarrying. As early as the antebellum period, women's rights activists argued that marriage was legalized prostitution when women had no choice but to marry, given the low wages working women faced.[74]

Women began working for wages and supporting children in the late-nineteenth and early-twentieth centuries as wage labor replaced agricultural labor, often bringing the work home to children or children to the work.[75] Some women did have alternatives. Politically engaged elite women of the late-nineteenth and early-twentieth centuries sometimes arranged their lives so as to live with close female friends. Women such as Molly Dewson, active in Roosevelt's New Deal, and Eleanor Roosevelt lived with women, vacationed with women, and strategized about politics with women.[76] Among social welfare activists, very few of the white women were married.[77] Possibly these options were much more available to elite women—just as Kitzinger and Wilkinson note that playing with sexuality is perhaps more possible for women in relatively privileged positions today[78]—in jobs and social settings where they were

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103 YALE L.J. 1073, 1083–89 (1994) (discussing state Married Women's Acts); Stanley, *supra* note 69, at 481–82 (discussing state Married Women's Act).

71. *See* Stanley, *supra* note 69, at 495–96 & n.58 (citing Burke v. Cole, 97 Mass. 113, 114 (1867), and Brooks v. Schwerin, 54 N.Y. 343, 348–49 (1873)).

72. *See id.* at 496–97.

73. *Id.* at 496.

74. *See* Siegel, *supra* note 70, at 1120–22, 1127–29.

75. Practices varied by ethnicity and region of the country. For discussions of women at work, see THOMAS DUBLIN, TRANSFORMING WOMEN'S WORK: NEW ENGLAND LIVES IN THE INDUSTRIAL REVOLUTION (1994) (discussing the effect of the Industrial Revolution on women's work); ALICE KESSLER-HARRIS, A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES (1990) (discussing wages as an interpreter and consequence of gender inequality); Elizabeth H. Pleck, *A Mother's Wages: Income Earning Among Married Italian and Black Women, 1896–1911*, *in* A HERITAGE OF HER OWN (Nancy F. Cott & Elizabeth H. Pleck eds., 1979) (discussing the historical differences in the workplace between women of different ethnic groups).

76. *See* BLANCHE WIESEN COOK, 1 ELEANOR ROOSEVELT 339 (1992). John D'Emilio and Estelle Freedman discuss the late-nineteenth-century emergence of educated women who could afford to live apart from men, and did. D'EMILIO & FREEDMAN, *supra* note 62, at 188–97.

77. LINDA GORDON, PITIED BUT NOT ENTITLED 43, 113 (1993).

78. *See* Kitzinger & Wilkinson, *supra* note 35, at 454–57. However, cities have long had substantial working class lesbian communities even given the difficult circumstances of discrimina-

less subject to pressures for gender conformity. It was in the late-nineteenth century, too, that supervision of morals in the distribution of Civil War pensions became more entrenched.[79] State benefits were consolidated at a time when some women were first able to make their own livings, which possibly made the enforcement of heterosexual norms more important. Public policy, though, envisioned women as dependent and, indeed, employers justified paying women lower wages by the belief that most did not need the money.[80]

Public pensions were first available to men. As this article later discusses, public service in the nineteenth century was service which was regarded as dangerous; typically, military service, service as a volunteer fireman and, as public employment expanded, service as a policeman.[81] It was only after public employment expanded into fields that would employ women, such as school teaching, that it would include characteristics generally imagined as feminine rather than masculine. Courts imagined these occupations, such as volunteer firemen, in ways that had men as the central actors and, indeed, they were jobs largely held by men.[82] When men holding these jobs died—in the Civil War or, later, in industrial accidents—women could gain access to support payments (meager though they might have been) without having a man in the house, and they could gain those payments as a matter of statutory entitlement rather than as a matter of charity.[83] They gained those payments through a normatively enforced public fixing of heterosexuality, yet once the payments were gained, legal officials might have very little to say concerning their living arrangements.[84] Then, if heterosexuality were enforced, it would have been through gossip and whispers rather than through formal legal rules.

I next turn to a discussion of some of the cases concerning the constitutionality of soldiers' pensions, firemen's pensions, and workmen's compensation. These programs were all tested under state constitutional provisions that either explicitly stated or had read into them limits on state spending, allowing states to spend only for a public purpose.[85] In

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tion. *See* ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY (1994) (studying Buffalo, New York).

79. *See* discussion *infra* notes 228–29 and accompanying text (discussing the intrusive supervision of Civil War pensions).

80. *See* KESSLER-HARRIS, *supra* note 75, at 8–9.

81. *See* discussion *infra* Parts IV–VI.

82. *See, e.g.*, Trustees of Exempt Firemen's Benevolent Fund v. Roome, 93 N.Y. 313 (1883).

83. THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 107 (1992).

84. *Cf.* Susan Sterett, *Serving the State: Consitutionalism and Social Spending, 1860s–1920s*, 22 L. & SOC. INQUIRY 311, 345 (1994) (discussing that indigence was the only consideration when determining whether or not a mother should receive a pension).

85. *See, e.g.*, Fire Dep't v. Noble, 3 E.D. Smith 440, 451 (N.Y. Ct. C.P. 1854) (evaluating firemen's pension under N.Y. CONST. art. I, § 6); *see also infra* Part V (addressing the constitutionality of pensions).

addition, the Fourteenth Amendment's Due Process Clause[86] was interpreted by the Supreme Court to allow spending only for a public purpose.[87] Thus, the legitimacy of spending by any state could always be raised in court, whatever the content of a state's constitutional provisions. The reasoning was that to spend state money for something other than a public purpose was to spend tax money illegitimately, which in turn is to take property without due process of law or just compensation.[88] The requirement that states could only spend for a public purpose was considered to be a part of the general law, and Thomas Cooley synthesized that notion as such in his 1876 treatise on taxation.[89] Cooley tied the requirement to constitutional provisions prohibiting states from taking property without compensation.[90] However, many states also enacted specific state constitutional provisions after the Civil War prohibiting the states from giving gifts to private corporations or individuals, in part a response to the granting of privileges to railroads.[91] States evaluated pensions under these provisions as well.

In addition to examining the constitutionality of pensions and the way that masculinity and femininity were imagined in the courts, I want to illustrate the enforcement of heterosexuality through a discussion of Megan McClintock's work on the administration of civil war pensions.[92] The administration of pensions was not usually addressed as a constitutional matter in appellate courts. As McClintock's work so richly illuminates, the administration of pensions did, however, enforce an understanding of what constituted a family, an understanding of the proper behavior which made one a wife.[93]

## IV. THE CONSTITUTIONALITY OF PENSIONS

By the time of the Civil War, pensions for military service from the federal government had been long established.[94] Federal pensions would

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86. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .").

87. *See* Loan Ass'n v. Topeka, 87 U.S. 655, 664–65 (1874).

88. *See Loan Ass'n*, 87 U.S. at 662–67.

89. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION 100 (1876).

90. *Id.* at 73–74, 101.

91. *See* LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT 123–28 (1948) (discussing the development of state constitutional provisions); *see also* Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853) (allowing local governmental investment upon state legislative authorization); HARTZ, *supra*, at 113–23 (discussing *Sharpless* and noting that this decision provided the impetus for the amendment of the Pennsylvania Constitution). For a discussion of conflicts over railroads and American economic development, see GERALD BERK, ALTERNATIVE TRACKS (1992).

92. McClintock, *supra* note 1.

93. *See* discussion *infra* Part IV (discussing the work of Megan J. McClintock on Civil War pensions to discuss the relationship between pensions and perceived behaviorial patterns within marriages).

94. *See* WILLIAM H. GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 9–119 (David Kinley ed., 1918) (providing a thorough analysis of military pensions from the colonial times through the Civil War); WILLIAM H. GLASSON, HISTORY OF MILITARY PENSION LEGISLATION IN

become a matter for considerable public controversy, but as a legal matter they were widely accepted as constitutional. At the federal level, pensions were constitutional because they were incident to the federal power to conduct a war, and pensions provided an inducement to service.[95] At the state level, their constitutionality was much more open to question, precisely because conducting a war was a power of the federal government. In addressing the constitutionality of soldiers' pensions, many of the earliest state cases did not address the characteristic of the work; instead, payments to soldiers were addressed as a question of the circumstances in which the states could pay people for meeting obligations to the federal government[96]—assisting the federal government in conducting a war was no responsibility of the states. In later cases, the nature of the work was addressed. Even as early as 1865, the Wisconsin Supreme Court allowed the state to pay soldiers as a matter of gratitude for the service they had given to their country.[97]

In *United States v. Hall*,[98] the Supreme Court addressed the constitutionality of military pensions as a whole while inquiring into the constitutionality of a statutory provision establishing criminal sanctions for the embezzlement of pension funds by guardians.[99] Justice Clifford found a specific grant of power in the Constitution allowing pensions: Congress could declare war,[100] raise and support armies,[101] and enact laws "neces-

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THE UNITED STATES 1–68 (1900) (discussing pre-Civil War pensions); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 105 (1992) (noting the expansion of the the use of pensions from the time of the American Revolution to the Civil War).

95. *See* United States v. Hall, 98 U.S. 343, 351 (1878) (recognizing the constitutionality of military pensions, in part, through the government's power to declare war, U.S. CONST. art. I, § 8, cl. 11, and the power to "raise and support Armies," *id.* cl. 12); *see also* COOLEY, *supra* note 89, at 74, 99–100.

96. *See, e.g.*, Mead v. Acton, 139 Mass. 341 (1885); Kelly v. Marshall, 69 Pa. 319 (1871); Hilbish v. Catherman, 14 N.Y. 154 (1870); Booth v. Town of Woodbury, 32 Conn. 118 (1864); Tyson v. School Dirs., 51 Pa. 9 (1865).

97. Brodhead v. Milwaukee, 19 Wis. 658 (1865). In writing for the majority, Chief Justice Dixon stated:

> I think the consideration of gratitude alone to the soldier for his services, be he volunteer, substituted or drafted man, will sustain a tax for bounty money to be paid to him or his family. Certainly no stronger consideration of gratitude can possibly exist than that which arises from the hardships, privations and dangers which attend the citizen in the military service of his country . . . . Who will say that the legislature may not, in consideration of such services . . . give to the soldier or his family a suitable bounty after his enlistment, or even after his term of service has expired? I certainly cannot.

*Brodhead*, 19 Wis. at 687.

98. 98 U.S. 343 (1878).

99. *Hall*, 98 U.S. at 345–51.

100. *Id.* at 351; *see* U.S. CONST. art I, § 8, cl. 11 ("Congress shall have power . . . [t]o declare War . . . .").

101. *Hall*, 98 U.S. at 351; *see* U.S. CONST. art I, § 8, cl. 12 ("Congress shall have power . . . [t]o raise and support Armies . . . .").

sary and proper" to carry these powers into effect.[102] Furthermore, the long history of pensions was considered evidence of long-standing acceptance in the United States.[103] If long accepted, pensions were unlikely to be unconstitutional. Indeed, that they had been instituted in the first Congress showed that the founders had approved of the pensions.[104] Pensions and bounties, the Court reasoned, induced men to serve their country and were therefore necessary and proper to carrying on a war.[105] If bounties and pensions were legitimate, so were laws ensuring they went to the people who deserved them, including soldiers' heirs.[106] Justice Clifford wrote:

> Bounties may be offered to promote enlistments, and pensions to the wounded and disabled may be promised as like inducements. Past services may also be compensated, and pensions may also be granted to those who were wounded, disabled, or otherwise rendered invalids while in the public service, even in cases where no prior promise was made or antecedent inducement held out.[107]

What made pensions from the federal government legitimate was a loose understanding of exchange; men had served and could be paid, even if they had not been promised the payment before they served. Those payments became something akin to property—something they could pass on to their children. A man's service in war earned him payments in a way that exempted his children from seeking their payments as a matter of unearned charity from the state.

The early relationship between obligations of and to the states and the "general" government emerged in cases discussing public subsidies to the draft. After 1863, the first year of conscription, localities would pay money to raise volunteers to meet their towns' obligation to the federal government for the draft.[108] Alternatively, sometimes groups would pay the money, and the township would reimburse the group.[109] The obli-

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102. *Hall*, 98 U.S. at 351; *see* U.S. CONST. art I, § 8, cl. 18 ("Congress shall have power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .").

103. *Hall*, 98 U.S. at 346–51. As stated by Justice Clifford:

> Power to grant pensions is not controverted, nor can it well be, as it was exercised by the States and by the Continental Congress during the war of the Revolution; and the exercise of the power is coeval with the organization of the government under the present Constitution, and has been continued without interruption or question to the present time.

*Id.* at 346.

104. *Id.* at 346, 350–51.

105. *See id.* at 351.

106. *Id.*

107. *Id.*

108. *See, e.g.*, Booth v. Town of Woodbury, 32 Conn. 118, 119 (1864) (adjudging the constitutionality of using town funds in establishing bounties to assist in satisfying the town conscription obligations); *see also* Hilbrish v. Catherman, 64 Pa. 154, 158 (1870).

109. *See, e.g.*, Tyson v. School Dirs., 51 Pa. 9, 10–11 (1865) (discussing Halifax township legislation establishing a bounty association and finding an act calling for the reimbursement of funds expended by the bounty association unconstitutional).

gation to the federal government was an obligation of the individual, not the locality. Therefore the localities could not constitutionally assist individuals, reimbursing them for expenses they incurred in meeting their draft obligations. But if a *collectivity* paid not just for its members but for the obligations of the town as a whole, reimbursing the collectivity was not spending for a private purpose but for the public purpose of assisting the male citizenry as a whole (usually simply described as the citizenry) to meet their obligations. State cases in the 1860s turned on these questions, not explicitly on the virtues of masculinity or concern for feminine dependency. When Cooley wrote on taxation, he first emphasized the limits on what the states could do,[110] while elsewhere urging the importance of the federal government's recognizing the importance of dangerous service in war.[111]

The individual quality of service emerged in the later cases, long after the Civil War. In 1912 the Connecticut court held pensions were unconstitutional because they would reward service long ago rendered, quite possibly in some other state.[112] In 1913 the Kentucky court in *Bosworth v. Harp*[113] held that state pensions for Civil War soldiers were constitutional.[114] In so doing, the court ascribed to men, women and children their proper roles, with men protecting women and children.[115] The court justified payment to Confederate soldiers by arguing that they had fought for a principle—the principle of state sovereignty.[116] Fifty years after the war, the court resurrected northern criticism of the South and of *Dred Scott*[117] in *Bosworth*, holding that such criticism justifiably alarmed Kentucky citizens in the 1850s.[118] Furthermore, the court referred to John Brown's raid on Harper's Ferry as an effort to "massacre . . . the women and children of the State,"[119] describing the women and children as "defenseless."[120] Pensions depended on masculine service which in turn rested on a contrast with the intrinsic helplessness of women and children. In that context, payment for service was justified. In conclusion, the court held:

> So long as the courage of the battlefield or the risking of one's life for his country is honored and it is the policy of the State to promote the

110. *See* COOLEY, *supra* note 89, at 76–83.

111. *Id.* at 100.

112. Beach v. Bradstreet, 82 A. 1030, 1032–34 (Conn. 1912).

113. 157 S.W. 1084 (Ky. 1913).

114. *Bosworth*, 157 S.W. at 1088 ("[A] tax is levied for public purposes [and therefore satisfies constitutional requirements] where the money is used to pay a pension granted in consideration of public services.").

115. *Id.* at 1086 (discussing John Brown's raid on Harper's Ferry).

116. *Id.* at 1085–87.

117. 60 U.S. 393 (1856).

118. *Bosworth*, 157 S.W. at 1087.

119. *Id.*

120. *Id.* at 1086 (arguing that John Brown's raid on Harper's Ferry "deeply stirred the South, for the defenseless women and children would be the first to suffer").

> loyalty and patriotism of the people by fostering the martial spirit, such services constitute a reasonable basis for classification. The honor due to the true and the brave is not limited to those who are successful in the struggle.[121]

The dissenting justice rather mildly pointed out that fighting for a losing side in a civil war was not service to the state.[122]

The irony of emphasizing the masculinity inherent in the dangerousness of war is that war puts men in a highly feminized position, making the maintenance of masculinity that much more difficult. Judith Lewis Herman argues that men's psychological troubles resulting from the trauma of war and women's psychological ills resulting often from the trauma from domestic violence and sexual abuse lead to the same complex of disorders.[123] Most poignantly, Pat Barker describes how men's trauma in World War I resembled poor women's everyday lives:

> Rivers [a military psychiatrist] had often been touched by the way in which young men, some of them not yet twenty, spoke about feeling like father to their men. Though when you looked at what they *did*. Worrying about socks, boots, blisters, food, hot drinks. And that perpetually harried expression of theirs. Rivers had only ever seen that look in one other place: in the public wards of hospitals, on the faces of women who were bringing up large families on very low incomes, women who, in their early thirties, could easily be taken for fifty or more. It was the look of people who are totally responsible for lives they have no power to save.
>
> One of the paradoxes of the war—one of the many—was that this most brutal of conflicts should set up a relationship between officers and men that was . . . domestic. Caring. As Layard would undoubtedly have said, maternal. And that wasn't the only trick the war had played. Mobilization. The Great Adventure. They'd been *mobilized* into holes in the ground so constricted they could hardly move. And the Great Adventure—the real life equivalent of all the adventure stories they'd devoured as boys—consisted of crouching in a dugout, waiting to be killed. The war that had promised so much in the way of "manly" activity had actually delivered "feminine" passivity, and on a scale that their mothers and sisters had scarcely known.[124]

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121. *Id.* at 1088.

122. In dissent, Justice Lassing noted:

> I concede that the Confederate soldiers were brave men, and that they fought with a courage and determination that challenged the admiration of the civilized world; but by the arbitrament of the sword every principle for with they contended was decided against them. The integrity of the Union was preserved. While theirs was a brave, gallant, and heroic fight, I cannot bring myself to believe that in their struggle for the lost cause they rendered either the national or the state government a "public service" within the meaning of these words as found in the Bill of Rights.

*Id.* at 1088 (Lassing, J., dissenting).

123. JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 7–32 (1992).

124. PAT BARKER, REGENERATION 107–08 (1993).

Barker is discussing the First World War; the pensions I will discuss are from the Civil War. But the scarcity that Barker notes, the inability to care for people for whom one is responsible, also colored the Civil War. Noting these continuities contributes to the understanding that drawing rigid distinctions on the basis of gender is a matter of artifice.

## V. PENSIONS AND THE NORMATIVE FAMILY

Men were concerned about enlisting for the army during the Civil War because they did not want to leave wives and children without material support.[125] During the first year of the Civil War, the federal government received more than enough enlistments,[126] but during the second year, the government did not, and the generally accepted reason was that men were concerned with what would happen to their families should they die.[127] When husbands, sons, and fathers were enrolled in the military and they had been the primary earners, their families could get public aid.[128] But public aid was not available if breadwinners died.[129] Facing the shortage of soldiers, in the summer of 1862 Congress expanded the money available to support families: it made mothers and sisters eligible for pensions and increased rates for widows and orphans.[130] In 1866, Congress made fathers and brothers eligible for pensions as well.[131]

Pensions also expanded substantially between 1865 and 1890, in part through relaxing evidentiary standards for proving family relationships.[132] McClintock argues, however, that the pensions laws eventually

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125. McClintock, *supra* note 1, at 456–58.

126. *Id.* at 460. This changed with the realization that the war would not be ended upon a single Union victory, but upon the "'complete conquest' of the South." *Id.* (quoting General Ulysses S. Grant on his impressions after the Battle of Shiloh).

127. *Id.* at 461.

128. *Id.*

129. *Id.*

130. *Id.* at 463 & n.15 (citing Act of July 14, 1862, ch. 166, § 2, 12 Stat. 566, 567). Section 2 of the Act of July 14, 1862 stated:

> [I]f any officer or other person named in [section one] has died . . . or shall hereafter die, by reason of any wound received or disease contracted while in the service of the United States, and in the line of duty, his widow, or, if there be no widow, his child or children under sixteen years of age, shall be entitled to receive the same pension as the husband or father would have been entitled to . . . to commence from the death of the husband or father, and to continue to the widow during her widowhood, or to the child or children until they severally attain to the age of sixteen years . . . .

Act of July 14, 1862, ch. 166, § 2, 12 Stat. 566, 567; *see also id.* § 3 (extending pension benefits to dependant mothers, subject to some constraints, when a deceased serviceman did not leave a widow nor legitimate children); *id.* § 4 (extending pension benefits to dependant, orphaned sisters when a deceased serviceman did not leave a widow, legitimate children, nor a mother).

131. McClintock, *supra* note 1, at 463 (citing Act of June 6, 1866, ch. 106, § 12, 14 Stat. 56, 58 (amending the Act of July 14, 1862, ch. 166, § 4, 12 Stat. 566, 567–68) (extending pension benefits to dependent fathers and brothers of deceased servicemen)).

132. *Id.* at 463 (citing Act of June 6, 1866, ch. 106, 14 Stat. 56; Act of March 3, 1873, ch. 234, 17 Stat. 566; Act of June 27, 1890, ch. 634, 26 Stat. 182 (relaxing evidentiary requirements for proving pension eligibility)).

instituted morality requirements for widows, making pensions not simply a matter of entitlement for women via their association with men, but also subjecting them to supervision by the state.[133]

Husbands were presumed to be the primary support, so when mothers needed the pensions they had to explain why their husbands could not support them.[134] Fathers claiming support had to explain why they could not support themselves.[135] In requiring explanation, the cases implicitly state what was expected: that men support themselves and their wives.[136] As McClintock states, "the order of family responsibility encoded in pension policy assumed that women first relied on husbands for support, then on sons."[137] When women worked for wages, their wages were generally lower than those of men, which in turn reinforced the need women might have had for their sons' support.[138] Furthermore, parents applied for pensions sometimes years after their sons had died; for when people aged it became less likely they could work for wages.[139] With the increase of time between the death of a son and application for a pension, evidentiary proof of support of the parents became more difficult.[140] Therefore, the pension expansions during the 1870s and 1880s required a lesser showing of support by allowing only a showing that a son would have been willing to support his parents.[141] The government sometimes simply assumed reciprocal parent/child obligations. For example, one mother had actually supported her son until he went to war.[142] After that, she became unable to work due to disability. The argument that gained her a

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133. *Id.* at 474–79 (discussing specific examples of state supervision of morality-based pension requirements).

134. *Id.* at 467.

135. *Id.*

136. *Cf. id.* at 467 & nn.25–26 (providing a number of examples of pension file reviews).

137. *Id.* at 469.

138. KESSLER-HARRIS, *supra* note 75; Joellen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage of the Voting Right*, 5 UCLA WOMEN'S L.J. 103, 135 (1994).

139. *See* McClintock, *supra* note 1, at 469.

140. *Id.*

141. *Id.* at 468 (citing Act of March 3, 1873, ch. 234, § 13, 17 Stat. 566, 571). As stated by section 13 of the 1873 act:

> [A] mother shall be assumed to have been dependent upon her son . . . if, at the date of his death, she had no other adequate means of support than the ordinary proceeds of her own manual labor and the contributions of said son or of any other persons not legally bound to aid in her support; and if, by actual contributions or in any other way, the son had recognized his obligations to aid in support of said mother, or was by law bound to such support, and that a father or a minor brother or sister shall in like manner and under like conditions, be assumed to have been dependent, except that the income which was derived or derivable from his actual or possible manual labor shall be taken into account in estimating a father's means of independent support . . . .

Act of March 3, 1873, ch. 234, § 13, 17 Stat. 566, 571.

For example, one woman received a pension despite the existence of only a single instance of support by her son in two years because that son wrote a letter evidencing his desire to provide support. *See* McClintock, *supra* note 1, at 468–69 & n.31 (describing the situation of Mary Harth).

142. *See* McClintock, *supra* note 1, at 470.

pension was that surely a son would not have left a mother to rely on charity once she was disabled.[143]

By 1890, Congress eliminated evidentiary requirements by allowing pensions for all parents, rather than requiring dependence.[144] The justification was no longer that parents had relied on that support, but instead that sons owed it to their parents and would have paid it had they not died in the service of their country.[145] The pretense, then, was that parents were not receiving payments from the state, that the state was allowing men to act in their appropriate masculine role, that of supporting their parents.

For widows, the evidentiary question was one both of marriage to the deceased soldier, and her continuing status as a widow.[146] Documenting marriage was not simple when the records were those of nineteenth-century localities.[147] Many people were married informally, and slaves were often forbidden from marrying at all.[148] Widows received pensions as long as they did not remarry; however, the Bureau of Pensions (no fools they) could see that this established an increased temptation to engage in sexual relations outside of marriage.[149] Therefore they wanted to

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143. *Id.* at 470–71.

144. *Id.* at 471 (citing Act of June 27, 1890, ch. 634, § 1, 26 Stat. 182, 182). Section 1 of the 1890 Act allowed the awarding of pensions to parents of deceased servicemen upon a showing that no widows or minor children were left and the parents were "without other present means of support than their own manual labor or the contributions of others not legally bound for their support." Act of June 27, 1890, ch. 634, § 1, 26 Stat. 182, 182.

145. *Id.* at 471 (citing *Notes of a Conference with Hon. William W. Dudley, Commissioner of Pensions*, H.R. MISC. DOC. NO. 48–43, at 24–25 (1884)). William W. Dudley, the Commissioner of Pensions in 1884, argued:

> [S]o far as determining the question of dependence is concerned, the law in its present form works great hardship in many deserving cases . . . . Now, I think the spirit of the pension law ought to reach far enough to provide for a mother who afterwards became dependent upon the labor of her own hands, or the assistance of others, upon the presumption that her son would have supported her had he lived. . . . [A]s the Government has taken him away I hold that the Government ought to try to make up, to some extent at least, to the dependent parent for the loss.

*Notes of a Conference with Hon. William W. Dudley, Commissioner of Pensions*, H.R. MISC. DOC. NO. 48–43, at 24–25 (1884).

146. McClintock, *supra* note 1, at 471.

147. *Id.* at 472. While the Bureau of Pensions preferred marriage records to substantiate marriage claims, they accepted other forms of evidence including witness testimony, child baptism records, or affidavits by marriage officiating individuals. *Id.* at 472 & n.39 (citing a number of congressional documents addressing pension evidentiary standards).

148. *Id.* at 471–73.

149. *Id.* at 476–77 (citing *Report of the Commissioner of Pensions for the Year 1868*, H.R. EXEC. DOC. 40–1, at 422 (3d Sess. 1868)). The Commissioner of Pensions noted:

> Serious abuses of privilege and flagrant violations of morality on the part of claimants under the present system exist, which seem to require that the Commissioner be clothed with discretionary power to adopt such means as may most certainly vindicate the purposes of equal justice and good morals.
>
> . . . .
>
> Widows, in increasing numbers, cohabit without marriage, refusing this solemn legal sanction for fear of losing their pensions thereby. Others live openly in prostitution for

supervise the morals of those widows receiving pensions, also contributing to the artifice that this was not state support but simply in lieu of a particular man—one who had performed his masculine duty.[150]

Given the lack of documentation of marriage, the Bureau of Pensions found themselves accepting evidence of cohabitation as evidence of marriage.[151] But they did require evidence of cohabitation, not just its assertion.[152] Claiming a pension when one had been a slave depended almost wholly on evidence of co-habitation.[153] Sometimes that evidence was supplemented with evidence of witnesses or, in one case, the testimony of the son of a former slaveholder that his father had allowed the applicant and her deceased husband to live together.[154] In 1864, Congress allowed pensions to those who were recognized as husband and wife and who had lived together for two years.[155]

Allowing pensions to women whose marriages had been informal meant that the Bureau felt compelled to concern itself with whether a marriage had been genuine and enduring, or whether it had been a brief affair.[156] Sometimes relationships fit into neither one nor the other category, and indeed, McClintock discusses one instance in which the Bureau of Pensions had to decide to which of two men a claimant had been married.[157] Annice Morgan was married to Jackson for three years, when he left to join the navy.[158] She claimed to have believed he was dead, and lived with Lemuel who then left to fight in the army.[159] Lemuel died, prompting Morgan to claim a pension as his widow.[160] But the Bureau of Pensions discovered that she had lived with Jackson after the War, caring for him until he died.[161] It was that marriage the Bureau decided had been

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> the same object. Thus is the government placed unwittingly in the strange attitude of offering a premium upon immorality, of which it should be relieved.

*Report of the Commissioner of Pensions for the Year 1868*, H.R. EXEC. DOC. 40–1, at 422, 450–51 (3d Sess. 1868).

150. *See* McClintock, *supra* note 1, at 476–77 (discussing the perceived need for and early attempts at restricting pensions to widows on moral grounds).

151. *Id.* at 472 & n.41 (citing files from the Bureau of Pensions).

152. *Id.* ("By accepting cohabitation as proof of valid marriages, pension administrators were following the lead of the antebellum judiciary . . . ." (citing MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 75, 79–80 (1985))).

153. *Id.* at 474.

154. *Id.* at 473 (describing the situation of Dilly Bostick).

155. For a fascinating discussion of what constituted evidence of a marriage among slaves, see Lea Vandervelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1103–10 (1997).

156. McClintock, *supra* note 1, at 474.

157. *Id.* at 474–75 (citing documents in the pension file of Annice Morgan).

158. *Id.* at 475.

159. *Id.*

160. *Id.*

161. *Id.*

the genuine one because it was first and because she had lived with that man longer.[162]

In making those choices, the Bureau of Pensions enforced a normative order of monogamy. According to McClintock, part of what persuaded the Bureau that someone had been a genuine wife was that the woman had acted appropriately to the position of a feminine wife.[163] Annice Morgan, had nursed the man recognized to be her husband until he died, which the Bureau of Pensions cited as evidence in its decision.[164] In another case, the claimant had children with the man she claimed to be her husband, and she nursed him when he was ill.[165] Those scripts of what the Bureau of Pensions would recognize to be a legitimate union emphasized an enactment of femininity, one that we need not take to be natural to marriage or to being a woman.[166] But it was that work of caring, not farm work or financial support, that pension applicants would cite to when trying to persuade the Bureau that they were genuine wives. That anyone was persuading the Bureau that someone was a genuine wife demonstrates how much it was a script to be performed rather than a position anyone could make up as they went along. Until 1882, the Bureau of Pensions could only terminate the pension of a widow on her remarriage, not by virtue of her cohabiting with someone.[167] Despite efforts on the part of the Bureau of Pensions, Congress was reluctant to allow them to supervise the home lives of pensioners.[168] But after 1882, the Bureau could terminate a woman's payments for cohabiting with a man.[169] The law of state benefits, as the benefits expanded, codified normative heterosexual family life.

In a class I taught, students and I had discussed what marriage was. A student in the class had friends who called themselves married but because they were lesbian the marriage was not recognized by the state. The student could not understand what the fuss was about in some Euro-

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162. *Id.* As a result of finding that the Morgan-Jackson union represented the legitimate marriage, Morgan's pension claim, based upon the Morgan-Lemuel relationship, was dropped by the pension examiner. *Id.*

163. *Id.* at 476 ("[B]ecause she acted like a wife, pension administrators restored her pension.").

164. *Id.* at 475 & n.46 (citing documents of the Bureau of Pensions and records of the Veterans' Administration).

165. *Id.* at 476 (discussing the situation of Kate Staplin, as evidenced in Staplin's pension file).

166. *See* Butler, *supra* note 9, at 21.

167. McClintock, *supra* note 1, at 476–77; *see, e.g.*, Act of July 4, 1864, ch. 247, § 7, 13 Stat. 387, 388 ("[O]n the remarriage of any widow receiving a pension, such pension shall terminate, and shall not be renewed should she again become a widow.").

168. McClintock, *supra* note 1, at 477 & n.50 (citing CONG. GLOBE, 40 Cong., 3d Sess. 678 (1869) (statement of Rep. Perham); *id.* at 679 (statement of Rep. Boyden); *id.* at 641 (statement of Rep. Schenck); *id.* at 641 (statement of Ebon Ingersoll)).

169. *Id.* at 477 (citing Act of Aug. 7, 1882, ch. 438, 22 Stat. 345, 345 (stating that "open and notorious adulterous cohabitation" will be grounds for termination of pension benefits)).

pean Court of Human Rights cases;[170] if people called themselves married, they were. Some students tried to define the essential qualities of marriage, such as monogamy, or living together with affection over the course of the marriage. Some mentioned that the purpose of marriage was reproduction, so the capacity for sexual reproduction must be present. Other students quickly rejected this, saying reproduction might once have been the point of marriage but it no longer was. The solution to some students was to allow anyone who wants to call themselves married to do so, and to abolish the civil status.

The students are not alone in finding a teleology to marriage. John Finnis argues that sexuality is only properly deployed when it is open to the possibility of reproduction; otherwise sexual partners would be using each other simply for pleasure, not as ends in themselves.[171] Marriage, according to Finnis, is a non-instrumental communion, offering companionship between two people.[172] Openness to procreation is "the intrinsic fulfillment of [that] communion;"[173] because the communion does not require children, marriage partners can have that communion even if they cannot have children. That would seem to suggest that gay and lesbian marriage would fit in his teleology, but it does not. Procreation between partners is impossible as a matter of biology within gay and lesbian couples, not just an accident of infertility. Finnis finds this distinction persuasive,[174] though possibly infertile heterosexual couples do not, as Dan Savage's discussion of adoption points out.[175] Finnis's analysis is explicit about the teleology of marriage;[176] he might well have approved of the Bureau of Pensions' effort to decide who was truly married.

I then suggested to students that the criteria of affection and monogamy might at times be aspirations, though that was not always the case, and that the criteria certainly did not describe married reality all the time for most married couples. Marriage, to be wholly bare bones and pedantic about it, is nothing more or less than a legally recognized status. To say that it is anything other than that has often implied a teleology along the lines of what Finnis argues for, one based in procreation. From the data McClintock provides, marriage has been enforced via state benefits

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170. Supranational courts have in recent years addressed what constitutes a marriage. The European Court of Human Rights (ECHR) judges disputes under the European Convention on Human Rights that arise in countries that are signatories to the Convention. The Convention includes a right to family life, and under that right applicants have challenged laws that in effect forbid transsexuals from marrying based on birth registration and prohibitions on same sex marriage. *See* Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 5 (1990).

171. John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 27–29 (1995).

172. *Id.* at 27.

173. *Id.*

174. *Id.* at 27–29, 30.

175. *See Gay Adoption*, *supra* note 11.

176. *See* Finnis, *supra* note 171, at 27–30 (addressing the teleology of marriage in part through an examination of ancient Greek thoughts on homosexuality).

to fit with a teleology, and not only based in procreation.[177] There was a proper way to be a wife and a proper way to be married. Such propriety involves not just a particular variety of sexual intercourse, but instead caretaking through illness and long term living together. That too would seem to suggest that gay and lesbian partnerships could count for the purposes of state benefits, but the caretaking is taken to be appropriate for women, not men, and more specifically, to a woman taking care of a man.

I next address shifts in the evaluation of pensions for firemen, where the courts turned from evaluating payments as a matter of justified exchange between those particular groups who benefited to an evaluation of public service and its hazards to those who engaged in it. Like evaluation of the constitutionality of state pensions for soldiers, changes represented shifts in evaluations of the obligations of citizenship and the relationship between citizen and government.

## VI. FIREMEN AND POLICEMEN

Before the mid-nineteenth century, employees were responsible for only a small percentage of the work done on behalf of the state; even police were not instituted until the mid to late-nineteenth century.[178] Major cities (such as New York) relied on volunteer firemen and compensated them in two forms: first, firefighters were exempt from military service,[179] and second, municipalities taxed fire insurance companies and allocated the money directly to firemen's charities, which often meant old age homes.[180] The military exemption demonstrates how much this service was tied to military service in the public characteristics it assumed. To the extent that military pensions rested on a justification that they induced men to serve by guaranteeing their dependents would be cared for, and that they rewarded courage and bravery, pensions for firemen could be understood to rest on the same basis.

The second benefit, allocating money to charities, was challenged, even before the Civil War. As shown by the following discussion, the courts addressed what constituted a public purpose. In characterizing what was a public purpose, courts initially drew on an understanding of exchange, but not between the general public and the firefighters; instead, the courts noted that the insurance companies benefited from firefighting, so it was equitable to make the insurance companies pay.

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177. *See* McClintock, *supra* note 1, at 471–79 (discussing mid-nineteenth-century perceptions of marriage as articulated by Congress and enforced by the Bureau of Pensions).

178. *See* ERIC MONKKONEN, POLICE IN URBAN AMERICA, 1860–1920, at 31 (1981).

179. *See* H.L. Wilgus, *Constitutionality of Teachers' Pensions Legislation*, 12 MICH. L. REV. 27, 31 (1913).

180. *Id.* at 32.

New York had provided for firemen since colonial times, first providing exemptions from military service for serving as firemen, then providing public funds for pensions.[181] From 1849, the legislature required that two percent of the premiums collected by foreign insurance companies in any city be paid to the fire department or corporation of firemen of the city.[182] In an 1854 case, *Fire Department v. Noble*,[183] this tax was challenged as an unconstitutional taking of property for a private purpose because it benefited a private corporation.[184] In *Noble*, the court held that it did not.[185] In 1852, Illinois enacted a provision similar to New York's, in which tax revenues from insurance payments made to companies incorporated outside Illinois would go to those who were injured and members of the private firemen's association.[186] This was immediately challenged as a violation of public purpose requirements, and in 1859 the Illinois Supreme Court in *Firemen's Benevolent Ass'n v. Lounsbury*,[187] upheld it as serving a public purpose.[188]

In addressing the constitutionality of these targeted taxes, these courts did not discuss masculinity and dangers of service; they did not address the worthiness of beneficiaries at all. Instead, they addressed taxation as a matter of what historian Einhorn calls "segmented logic":[189] those who benefit should pay, and there is little sense of a more common general benefit. The courts reasoned that insurance companies were the direct beneficiaries of firefighting, and therefore states could require them to pay.[190] As Robin Einhorn notes, this form of taxation served two purposes: it raised money for the Firemen's Benevolent Association, but it did so in a way that gave a competitive advantage to local insurance companies.[191]

The cases addressed by states after the Civil War spoke much more of general public benefit, and indeed Einhorn argues that the Civil War brought a sense of common purpose to politics.[192] It is in this later period that cases discussed the characteristics required of beneficiaries, emphasizing the importance of the courage required for the work and the

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181. *Id.* at 31–32.

182. Act of March 30, 1849, ch. 178, 1849 N.Y. Laws 239. Previously, the state collected two percent of the foreign insurance premiums, but the collected money was paid directly to the state. Wilgus, *supra* note 179, at 32.

183. 3 E.D. Smith 440 (N.Y. Ct. C.P. 1854); *see also* Fire Dep't v. Wright, 3 E.D. Smith 453 (N.Y. Ct. C.P. 1854) (utilizing the *Noble* decision).

184. *See Noble*, 3 E.D. Smith at 453.

185. *Id.* at 451–52.

186. *See* Firemen's Benevolent Ass'n v. Lounsbury, 21 Ill. 511, 511–12 (1859) (describing the Act of June 21, 1852).

187. 21 Ill. 511 (1859).

188. *Lounsbury*, 21 Ill. at 515–16.

189. EINHORN, *supra* note 2, at 25–26, 149–50; *see Lounsbury*, 21 Ill. at 515–16.

190. *See Lounsbury*, 21 Ill. at 513; *cf. Noble*, 3 E.D. Smith at 451–52.

191. EINHORN, *supra* note 2, at 149–50.

192. *Id.* at 224.

women and children depending on those who risked their lives.[193] No talk of the duty of men or the courage required of them appeared in the early cases, only a straightforward understanding of the benefits accruing to fire insurance companies and their concomitant obligations.[194] When the cases began to analyze the courage of men and dependence of women is when, as Nancy Fraser and Linda Gordon argue, the meaning of wage labor first came to connote masculinity and independence rather than dependence.[195] The discussion of masculinity appeared as sexual identities were beginning to be understood as fixed characteristics of human beings, rather than as descriptions of behavior in which people engaged. I would not argue that the general intellectual change in perceptions of sexual identity caused the changes in how the courts understood the value of pensions. Rather, the Civil War transformed relations of federalism and of politics enough to account for the transformation in focus. However, the heightened sense of masculinity and femininity in the cases does fit with the naming and fixing of sexual identities that John D'Emilio and Estelle Freedman ascribe to the late-nineteenth century.[196]

A touchstone case out of New York in 1883, *Trustees of the Exempt Firemen's Benevolent Fund v. Roome*,[197] once again challenged a tax on private insurers to create a pension fund for volunteer firemen.[198] By this time, localities were beginning to rely on employees for work rather than on the older system of having direct beneficiaries pay for services. However, *Roome* raised a challenge to the older system of pensions. One of the first and most important civil service cases under the anti-gift provisions in state constitutions, therefore, actually addressed older spending forms rather than new funding directly from city councils or state legislatures to employees. Even so, the court held that the pensions were constitutional, explaining:

> With the growth of the city the number of the firemen increased, and the amount and danger of their service. The old engines, moved with difficulty and cumbrous and rude in construction, gave place to better machines, and the service improved as the demand upon it grew. The dangers of the work were obvious, and a courage and daring which has gone into history began to leave behind it men who were maimed

193. *See, e.g.*, Trustees of the Exempt Firemen's Benevolent Fund v. Roome, 93 N.Y. 313, 319–20 (1883); *see also infra* note 197–199 and accompanying discussion (examining *Roome*).

194. *See Lounsbury*, 211 Ill. at 511 (discussing the constitutionality of benefit legislation, but failing to discuss the courage of firemen and hazards of service); Fire Dep't v. Noble, 3 E.D. Smith 440 (N.Y. Ct. C.P. 1854) (discussing firemen's pension issues in a very antiseptic manner).

195. Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 316–18 (1994).

196. *See* D'EMILIO & FREEDMAN, *supra* note 62, at 223–29.

197. 93 N.Y. 313 (1883).

198. *Roome*, 93 N.Y. at 313.

> and crippled in the public service, and widows and orphans deprived of their natural protectors and reduced to poverty and want.[199]

The tax was therefore not a grant of a special privilege to a private corporation or association, nor was it a gift from the state to a private undertaking. The firemen were not state employees and indeed in that sense they constituted a private organization. But drawing on an older legal tradition, whether one was in public service or not depended on the function one served, not the accident of who was an employer or owner. *Roome* focused less on the justice of making the insurance companies pay for the firemen, choosing instead to highlight the needs of dependents and bravery of men. Masculinity implied dangerousness and financially providing for a heterosexual family.

The world of firemen was actually very male-defined. In the cities, firemen did not just join together to put out fires. Fire companies were outgrowths of working men's clubs.[200] They staged minstrel shows, putting on persona along with blackface that they did not assume in daily life.[201] Bowery boys, the New York City working class men, some of whom were volunteer firemen, lived in a very male world, where their primary identifications were with other men.[202] Bowery boys also went out with women, and were known for their rakish ways.[203] Defining masculinity may have required dangerousness, but in return the world in which men spent their time could be very male-defined.

States also began to consider pensions for policemen. In the early-twentieth century, Illinois considered expanding pensions for police to police matrons and to police operators, who worked within the police station.[204] Members of the state legislature threatened a constitutional case against the expansion; the *Chicago Tribune* argued that the only police jobs that deserved pensions were those which were dangerous, thereby excluding both operators and police matrons.[205] In 1916 the Illinois Supreme Court held police pensions to be constitutional, saying that it was a way of "retiring from the public service those who have become incapacitated from performing the duties as well as they might be performed

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199. *Id.* at 320; *see* Wilgus, *supra* note 179, at 33.

200. *See* ERIC LOTT, LOVE AND THEFT 81–85 (1995); SEAN WILENTZ, CHANTS DEMOCRATIC 259–61 (1984).

201. LOTT, *supra* note 200, at 80–85.

202. *Id.*

203. *Id.* at 81.

204. *See* Act of July 1, 1911, 1911 ILL. LAWS 170 (amending the Act of April 29, 1887, 1887 ILL. LAWS 122, by adding section 3a which extended police pensions to police matrons); *see also* Lyons v. Police Pension Bd., 99 N.E. 337, 337–38 (Ill. 1912) (discussing the original Act and the amendment and finding the amendment constitutional).

205. *House Firm on Changes in Police Pension Bills*, ILL. ST. J., May 10, 1911, at 1; *Police Pensions Hit Snag*, CHI. TRIB., May 10, 1911, at 4.

by younger or more vigorous men."[206] In 1921, the Alabama Supreme Court also praised the work of the hazardous services as worthy of reward:

> [T]he legislature may provide a system, whereby municipalities . . . can increase in efficiency a department designed to protect life and property, by providing for the members of its fire departments, their wives and little ones, after the term of active service has been ended, either by death or age, to the end that the public may retain in this hazardous service men of the most faithful and efficient class . . . .The compensation thus paid, by whatever name called, is not a gratuity . . . .[207]

Both association in a heterosexual family and proper masculinity were present in the Alabama court's explanation of what made pensions allowable. First, state benefits were available as earned to women who were married to firemen and to their children.[208] Second, masculinity was characterized as a question of hazardous service; that hazardous service is what earned a pension.[209] Even having earned a pension, a man could be in a somewhat ambiguous position: they were often paid pensions because they had been disabled or they were too old to serve. State pensions were a recognition of masculinity but they could shade into compensation for feminizing injuries.[210]

It would be possible to characterize the cases concerning pensions for firefighters and policemen as cases concerning gender, rather than sexual orientation, were one to focus on the distinction. The discussion of hazardousness—of facing danger—would seem to fit neatly within what we have long thought of as characterizations of gender. However, such gender stereotyping operated within a regime of heterosexual family life: the state provided pensions for the wives and children. Dangerousness was masculine in the context of having a wife and child to care for; women and children were the backdrop against which men enacted masculinity. The masculine characteristics were difficult to understand outside a governing system of heterosexual families, just as the feminine characteristics of caring and nursing were defined as wifely characteristics in the cases concerning who was a wife for the purposes of military pensions. Caring and nursing for a man made one his wife; they did not make one a woman.

Women who were not wives, but rather mothers without husbands, were forced to rely on other forms of state relief, depending on the reason a woman did not have a husband. Nineteenth-century tort litigation occasionally compensated women who had lost husbands in industrial

206. People *ex rel.* Kroner v. Abbott, 113 N.E. 696, 698 (Ill. 1916).

207. Cobbs v. Home Ins. Co., 91 So. 627, 629 (Ala. Ct. App. 1921).

208. *Cobbs*, 91 So. at 629.

209. *Id.*

210. *See* Seth Koven, *Remembering and Dismemberment: Crippled Children, Wounded Soldiers, and the Great War in Great Britain*, 99 AM. HIST. REV. 1167, 1191–92 (1994) (discussing injury, war, and feminization in Britain).

accidents.[211] Local systems of poor relief and almshouses also sometimes housed women.[212] After 1900, activists argued that women with children to support should receive payment from the state. While advocates called these pensions, in line with soldiers' and civil servants' pensions,[213] in the early-twentieth century states more often considered them unearned charitable payments. I will outline questions concerning the constitutionality of these pensions in the next section.

## VII. PENSIONS FOR WIDOWS

Between 1910 and 1920, forty states instituted payments to single mothers, though the funding in most states meant that very few women actually received payments.[214] Some advocates argued that payments should be seen as something earned, that women were doing a public service in raising children, and that the polity had an obligation to encourage mothers to do a good job of rearing children by paying them for the work.[215] However, most states enacted the mothers' pensions on the basis of charity, paid to women who could not otherwise support themselves and who proved themselves worthy.[216] In Illinois pensions were enacted on a more universal basis,[217] but they were quickly changed to a much more restrictive program.[218] In 1914, Arizona also enacted a broad

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211. *See* SKOCPOL, *supra* note 83, at 290.

212. *Cf.* ROBERT H. BREMNER, THE PUBLIC GOOD: PHILANTHROPY AND WELFARE IN THE CIVIL WAR ERA 150–53 (discussing poorhouses and other means of housing the indigent).

213. *See* MOLLY LADD-TAYLOR, MOTHER-WORK: WOMEN, CHILD WELFARE, AND THE STATE, 1890–1930, at 143–48 (1994).

214. *See id.* at 148 (noting the financial difficulties associated with the mothers' pensions); SKOCPOL, *supra* note 83, at 424 (noting the emergence of mothers' pensions in forty states by the year 1920).

215. *See* LADD-TAYLOR, *supra* note 213, at 135–36, 143–48; *see also* SKOCPOL, *supra* note 83, at 426 (describing the fears of Mary Richmond, a prominent charity offical, that mothers' pensions evidenced the "same mixture of motive"—payment of a debt versus charity—as experienced with soldiers' pensions). Ladd-Taylor differentiates between three groupings of early-twentieth-century advocates: sentimental maternalists, progressive maternalists, and feminists. *See* LADD-TAYLOR, *supra* note 213, at 7. In discussing women's pensions, she notes that all three groups supported the pensions, but for different reasons—sentimental maternalists sought to preserve maternal dignity, assist poor women in fulfilling parental responsibilities, and prevent juvenile delinquency; progressive maternalists viewed the pensions as a means of coping with poverty; and feminists as a means of renumeration. *Id.* As a result of these different rationales underlying the groups' support of mothers' pensions, the maternalists sought pension coverage only for those individuals without the "support of a male breadwinner," while the feminists argued for pension coverage for all mothers. *Id.*

216. *See* LADD-TAYLOR, *supra* note 213, at 138.

217. *See* ILL. REV. STAT. § 175 (Hurd 1912). In pertinent part, the Illinois statute, the first of its kind, stated:

> If the parent or parents of such dependent or neglected child are poor and unable to properly care for the said child, but are otherwise proper guardians and it is for the welfare of such child to remain at home, the court may enter an order finding such facts and fixing the amount of money necessary to enable the parent or parents to properly care for such child, and thereupon it shall be the duty of the County Board . . . to pay to such parent or parents . . . the amount so specified . . . .

*Id.*; *see also* SKOCPOL, *supra* note 83, at 428.

218. *See* ILL. STAT. ANN. ch. 37, ¶ 3416(1)–(21) (Callaghan 1913–1916); *see* SKOCPOL, *supra* note 83, at 429. For example, the amended version limits pension disbursements to "[a] woman

pension plan which included a provision for the elderly.[219] Two years later, the Arizona Supreme Court struck down these pensions in *State Board v. Buckstegge*,[220] because, in part, they did not adhere to a wholly charitable framework.[221] Because the program was not closely enough means-tested, it gave support to too many women.[222] The Chief Justice writing for the majority stated:

> I think the theory upon which a pension system of this kind must be sustained is that the state owes a duty to take care of the unfortunate members of society who, by reason of age or mental or physical infirmity, are unable to care for themselves, and are not the owners and possessors of property sufficient to sustain them from want and beggary. Certainly a citizen and taxpayer ought not to be made or required to help pay pensions to those who have enough and to spare of the world's goods. I can think of no principle of law or justice that could be invoked to sustain a law that required him to do so.[223]

In other words, a plea of total dependency was the price of social spending outside service to the state. Women as mothers and not wives of civil servants or soldiers were analogous to the ill and disabled rather than to civil servants or soldiers. By its reasoning in *Buckstegge*, the Arizona Supreme Court did not accept that women were serving the state by raising children.[224]

In sharp contrast with some of the soldiers' pension cases, courts addressing mothers' pensions did not provide homage to the work of mothering as that evidenced in courts addressing the patriotic work of soldiering.[225] In *Buckstegge*, the appellants challenged the program as not

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whose husband is dead or whose husband has become incapacitated for work by reason of physical or mental infirmity . . . provided such woman has had a previous residence for three years in the county . . . and is the mother of a child or children." ILL. STAT. ANN. ch. 37, ¶ 3416(2).

219. *See* Act of Nov. 3, 1914, 1915 Ariz. Sess. Laws 10, *reprinted in* State Bd. v. Buckstegge, 158 P. 837, 838 (Ariz. 1916). The Arizona law stated in part:

> [I]n order to care for aged people and people incapable of earning a livelihood by reason of physical infirmities, and widows or wives whose husbands are in penal institutions or insane asylums, they being mothers of children who are under the age of sixteen (16) years, a system of pensioning is hereby established.

Act of Nov. 3, 1914, 1915 Ariz. Sess. Laws 10 § 2.

220. State Bd. v. Buckstegge, 158 P. 837 (Ariz. 1916).

221. *Buckstegge*, 158 P. at 841–42. The court also recognized that the title of the legislation submitted to voters did not adequately convey that the pension plan would supplant almshouses currently used to house the poor, in violation of the Arizona Constitution. *Id.* at 840–41; *see* ARIZ. CONST. art. IV, § 13 ("Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title . . . .").

222. *See Buckstegge*, 158 P. at 841–42.

223. *Id.* at 842 (Ross, C.J.).

224. *See id.*

225. *Compare, e.g., id.* at 838–42 (addressing mothers' pensions), *with* Bosworth v. Harp, 157 S.W. 1084, 1085, 1087–88 (Ky. 1913) (addressing soldiers' pensions). For example, the *Bosworth* court, in finding that soldiers' pensions applied to soldiers fighting for the Confederacy, ended their decision with the following statement:

generous enough, and as replacing almshouses with inadequate payments.[226] In emphasizing that point, the appellants likened pensions to leaving a baby on the street with $6 pinned to her (the monthly amount paid for a child), and saying the father was no longer liable for support.[227] That is, the state was directly taking the place of a man. The state could not meet its obligations with a set monthly payment anymore than a father might have.

Women receiving pensions had to conform to an image of heterosexuality, but they need not have a man around. In return for payments, the state often provided quite intrusive supervision, checking to see if one had a man in the house (which was unacceptable).[228] Protection had its price; when one gains protection, one depends on the protector's rules.[229]

Pensions law was one arena that structured what it meant to be a family. What it meant to be a family reinforced heterosexual norms: women lived with men and were dependent on them, and children were dependent on fathers' income and mothers' care. Men were independent, including when they called upon state payments, because they had earned those payments. The task for this article has been to make some move toward understanding what has marked straightness, linking that to the emergence of individualized state benefits in the late-nineteenth and early-twentieth centuries. Because we live in a world where straight culture dominates, we are, on the whole, well aware of these markers. I simply want to set these characteristics into a different context, one that highlights their connection to straightness. I would not argue that the availability of state benefits cause heterosexuality or is a primary reason for men and women living together. I only want to note how state programs might reinforce it.

The late-nineteenth century was a time in which sexual identities were becoming less flexible and more obviously marked, in particular for gay men. For wealthy women, sexual ambiguity was possible, and in-

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> So long as the courage of the battle field or the risking of one's life for his country is honored, and it is the policy of the state to promote the loyalty and patriotism of the people by fostering the martial spirit, such services constitute a reasonable basis for classification. The honor due to the true and the brave is not limited to those who are successful in the struggle. Greece still honors the Spartans who defended the pass at Thermopylae. The names of Wallace and his comrades are yet household words in Scotland. They who died at the Alamo are honored of all Americans. The state may show that the republic is not ungrateful to these men not only by erecting monuments to them when dead or placing flowers on their graves, but it may with equal propriety gladden their hearts while living and in their infirmity give them bread.

*Bosworth*, 157 S.W. at 1088.

226. *See Buckstegge*, 158 P. at 841.

227. Brief for Appellant, State Bd. v. Buckstegge, 158 P. 837 (Ariz. 1916) (No. 1456) (on file with author).

228. *See* SKOCPOL, *supra* note 83, at 467–68.

229. *See* WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 168–70 (1995) (discussing the state and protection).

deed virtually necessary for a career, since it was difficult to care for a man and children while also being active in, for example, social welfare work. Linda Gordon notes that many of the white women active in social welfare in national political networks were unmarried.[230] While the late-nineteenth century might have provided some flexibility for upper class women, legal practices were working at fixing identity, and state payments contributed. Megan J. McClintock argues that the administration of civil war pensions fixed a normative family, one that had all the trappings of state-recognized legitimacy.[231]

## VIII. CONCLUSION

The late-nineteenth century developed an understanding of homosexuality based on a medical model in which it was a distinctive perversion and a quality of individuals. The effect was to both make people more reticent in personal letters and, perhaps paradoxically, to make sexuality more often spoken of as a way of policing it. At the same time, governing was becoming less a matter of ensuring that those who benefited paid and more a matter of ensuring that what the government did was a matter of general benefit. The more direct relationship implied in the revised supervision of public purpose—from whether a tax targeted on fire companies, or reimbursement to a collectivity for raising draft substitutes, was public to whether the individual men had earned the pension from the payments—meant that qualities implied in the work, rather than only the nature of the exchange, would be examined. Celebrating qualities required to be a soldier or fireman accompanied, neither causing nor caused by, changes in political relations more generally.

Clearly, the cases we have seen from the latter part of the nineteenth and the early-twentieth centuries discuss a marked femininity and masculinity. These markers of dangerousness and dependence would usually be discussed as markers of gender rather than sexual orientation, and indeed I have done so in another article.[232] Linda Gordon and Nancy Fraser expand our understanding of what is implied by gender by noting how dependence and independence have been interpreted in changing ways historically, arguing that they have been marked as feminine and masculine.[233]

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230. GORDON, *supra* note 77, at 111–13. It was more common, however, for African American activist women to be married and have children. *Id.*

231. McClintock, *supra* note 1, at 479–80; *see also* discussion *supra* Part V (addressing pensions and the normative family through a discussion of McClintock's work on Civil War and post-Civil War pensions).

232. Sterett, *supra* note 84, at 315–18 (discussing women as dependents of men and recognizing this as a marker of gender, rather than sexual orientation).

233. Fraser & Gordon, *supra* note 195, at 316–18.

Masculinity and femininity were, in the pensions cases, associated with living in a heterosexual family. Women were dependent—that was an acceptable feminine characteristic; but they were dependent on men as "their natural protectors,"[234] as the New York Firemen's cases had it. I would argue we could as easily see these cases as being about sexual orientation; that is, they concern how to be a heterosexual man or woman and how to keep one's part in the marriage bargain. Switching frames from gender to sexual orientation is not a simple substitution of one term for another, as though neither signifies very much. For as we have seen, markers of dependence went along with the fact that clients were women, which in turn went along with their having been dependent on a man—a man who could no longer be depended upon. Andrew Koppelman argues that sexual orientation discrimination is "really" gender discrimination, because gay men and women are discriminated against on the basis of traits associated with femininity or masculinity.[235] I would argue that there is no "really," except for the convenience of making a plausible claim in Title VII.

Gender discrimination cannot be wholly seen as a matter of discrimination on the basis of sexual orientation, because feminine, straight women are sometimes discriminated against precisely because of their femininity. But because evaluating sexual orientation is a matter of measuring "proper" ways to behave, it is about the imposition of gender. We can choose to highlight or emphasize one framework over another, but to say something is one or the other implies a preexisting differentiation of the categories I find implausible.

234. Trustees of the Exempt Firemen's Benevolent Fund v. City of New York, 93, N.Y. 313, 320 (1883) ("The dangers of [firefighting] were obvious, and a courage and daring which has gone into history began to leave behind it men who were maimed and crippled in the public service, and *widows and orphans deprived of their natural protectors and reduced to poverty and want.*" (emphasis added)).

235. *See* discussion *supra* notes 18–28 and accompanying text.

# RECONSTRUCTING MARRIAGE: AN INTERSEXIONAL APPROACH

MARTHA M. ERTMAN*

*The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time.*[1]

## INTRODUCTION

Commercialization of heterosexual relations, specifically marriage, has the potential to further the goals of queer theory by undermining gender and sexual orientation hierarchies. Focusing on marriage arguably implements Dorothy Allison and Esther Newton's imperative that queer theorists "deconstruct heterosexuality first,"[2] rather than deconstruct gay, lesbian and bisexual identity while paradoxically leaving unchallenged constructions of heterosexuality as natural, essential, superior, or inevitable. One way to deconstruct (and reconstruct) marriage is to attach value to labor done by homemakers for their families. While homemaking labor could be commodified using various market-based models,[3] I have

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1. BENJAMIN CARDOZO, THE PARADOXES OF LEGAL SCIENCE 129 (1928). Another commentator on the reinvigoration of alimony used this quotation as an epigram in her comment on Joan Williams' proposal to redefine family wealth entitlements. *See* Emily Field Van Tassel, *Rebinding the Sticks: A Comment on* Is Coverture Dead?, 82 GEO. L.J. 2291 (1994) (commenting on Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994)).

2. The danger of queer theorists applying constructionist analysis only to discuss gay and lesbian issues is that doing so deconstructs homosexuality, leaving heterosexuality in its naturalized, superior position. Dorothy Allison and Esther Newton foresaw this danger and produced buttons demanding that queer theorists "Deconstruct Heterosexuality First." Lisa Duggan, *Queering the State*, *in* SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 179, 185 (Lisa Duggan & Nan D. Hunter eds., 1995) [hereinafter SEX WARS].

3. Other commentators have suggested partnership models as appropriate vehicles to justify post-divorce income sharing. *See, e.g.*, Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2454–60 (1994); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 71 (1993). A recent article analyzes premarital agreements by exploring how U.C.C. Article 2, by analogy, might govern their terms and enforcement. *See* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of*

proposed elsewhere that marriage be commercialized through Premarital Security Agreements, or PSAs.[4]

PSAs would establish a debtor/creditor relationship between spouses in order to quantify and value homemaker contributions to family wealth. Governed by the same rules as Article 9 of the Uniform Commercial Code, PSAs would arise at the beginning of the marriage, and would recognize homemaker contributions to family wealth by treating the primary homemaker as a creditor in relation to her[5] primary wage-earning spouse. The debt is based on the primary homemaker's contributions to the joint marital enterprise. Specifically, the primary wage-earner would be indebted to the primary homemaker for the value of the homemaker's domestic labor and lost opportunity costs, which enable him to attain "ideal worker" status.[6] If the marriage endures, the primary wage-earner pays his debt to the homemaker by sharing with her the stream of income he enjoys by virtue of his ideal worker status. If instead the spouses divorce, the divorce would constitute default on the loan, entitling the primary homemaker to foreclose on collateral (designated as 50 percent of marital property) in order to get the expected return (continued sharing of the primary wage-earning spouse's income) on her loan of homemaking services and lost opportunity costs. The amount of the debt would be calculated as an annual payment equal to 30 percent of the difference between the spouses' income at the time of divorce. These payments would continue for a period of years equal to half

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*Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 188–89 (1998).

4. For a fuller analysis describing how PSAs could commercialize marriage, see Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998) [hereinafter Ertman, *Commercializing Marriage*].

5. This essay uses female pronouns to refer to primary homemakers and male pronouns to refer to ideal workers, since women and men are likely to play these respective roles in typical heterosexual marriages. The adjective "primary" reflects the wage labor of many people who also have primary responsibility for homemaking. In 1996, 70 percent of married mothers participated in the wage labor force. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 404 tbl. 631 (117th ed. 1997). But many of these women tailor their work force participation to accommodate caregiving responsibilities. They might, for example, work part time, only part of the year, or near home. *See* VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 41, 60 (1988). Consequently, women on average earn less than men. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, MONEY INCOME IN THE UNITED STATES: 1996, at 26–27 tbl. 7 (1997). This gendered wage gap occurs in all racial groups, but is less pronounced between men and women of color than between white men and women. *Id.* Regardless of their employment status, women in heterosexual relationships do most of the housework. ARLIE RUSSELL HOCHSCHILD, THE SECOND SHIFT 8 (1989). These patterns suggest the accuracy, on average, of using female pronouns to describe primary homemakers and male pronouns to describe primary wage-earners. However, there is nothing in the proposed Premarital Security Agreements that requires that gender or sex determine which role a spouse plays, or even that there be a primary homemaker and an ideal worker. Ertman, *Commercializing Marriage*, *supra* note 4, at 75–76.

6. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2255–56 (1994) ("A wife who shoulders childrearing and other domestic responsibilities allows her husband . . . to perform as an ideal worker.").

the duration of the marriage plus the difference between 18 and the age of the youngest minor child.

Set out as a formula, the calculation looks as follows:

$$\underline{\text{Annual Payment}} \qquad \underline{\text{Duration}}$$
$$(.3(\text{high income} - \text{low income}))\ (\underline{\text{length of marriage}}{2} + (18 - \text{age of youngest minor child}))^{7}$$

PSAs are the latest contribution in a wave of recent scholarship which has sought to create a theory of alimony to alleviate the twin problems of displaced homemaker indigency and the general devaluation of women's work in both the home and market. Most analysis regarding reinvigorating alimony falls into four categories: legal economic and liberal, cultural, or radical feminist. Perhaps due to ideological divides between these approaches, no single proposal has generated broad-based support. Commercializing marriage through PSAs has the potential to achieve this cross-over appeal by satisfying much of what these disparate proposals seek to achieve.[8] In *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*,[9] I explain how PSAs would operate, and contend that PSAs have the potential to appeal to legal economic as well as liberal, cultural, and radical feminist approaches.

This essay further develops the crossover potential of PSAs, exploring whether commercializing marriage through PSAs has the potential to queer marriage doctrine.[10] If so, such commercialization would doctrinally implement some of the insights of intersectionality theory, as it implicates (to a greater or lesser extent) sex, gender, class, and sexual orientation.[11] Consistent with the theme of this Symposium, this approach could be described as InterSEXional.[12]

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7. For further discussion of the amount of the marital debt secured by the premarital security interest, see Ertman, *Commercializing Marriage*, *supra* note 4, at 43–50.

8. *See* Ertman, *Commercializing Marriage*, *supra* note 4, at 63–97.

9. *Id.*

10. "Queer" is increasingly used as a verb to describe the application of queer theoretical insights to various contexts. *See, e.g.*, CARL F. STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 150 (1995) (contending that the majority opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), "'queers' the statute so that the boundary between acts and identities is muddied"); Duggan, *supra* note 2, at 179 ("The time has come to think about queering the state."); Jonathan Goldberg, *Introduction* to QUEERING THE RENAISSANCE 1, 1 (Jonathan Goldberg ed., 1994) ("[T]he process of queering the Renaissance has been under way for some time."). While the definition of the term "queer" is deliberately left open to minimize essentialist dangers, when used as a verb it generally connotes applying the insights of queer theory to new contexts, such as law, activism, or history. To queer something is often to turn it on its head, show the contingency of its underpinnings, and perhaps reveal the subversive potential in something that seems to be the very cornerstone of traditional gender relations.

11. Some theorists might object to describing an analysis that accounts for dominant identities, such as heterosexuality, as intersectional (or interSEXional). For example, Peter Kwan states:

> [S]traight white maleness arguably is a multiple identity, but intersectionality theorists would resist the claim by straight white males that theirs is an intersectional subjectivity. Central to intersectionality theory is the recovery of the claims and identities of those

Part I of this essay briefly describes PSAs and sketches how they have the potential to appeal to a wide range of ideological positions. Part II expands this analysis to speculate what various queer theorists might appreciate and/or object to about PSAs. Specifically, PSAs might interest queer legal theorists because they could implement the insights of queer theory by: (1) revealing the constructed nature of heterosexuality and thus undermining compulsory heterosexuality;[13] (2) accounting for gender performativity and strategic provisionality;[14] (3) queering the state;[15] (4) intervening in legal conflations of sex, gender, and sexual orientation;[16] and/or (5) creating social space for same-sex marriage by focusing marriage doctrine on economic rather than gendered or sexed aspects of heterosexual marriage.[17] Some queer theorists might object to the way that PSAs could buttress compulsory heterosexuality, reinforce race and class hierarchy by treating white, middle and upper-middle class marriages as paradigmatic, and/or ignore important concerns of many people of color and poor people by focusing on marriage as the major

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> who, like African-American women, are pushed to the margins of the racial discourse because of assumptions of patriarchal normativity, and simultaneously pushed to the margins of the feminist discourse because of assumptions of racial normativity.

Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1275 (1997). Given the importance of deconstructing unmarked as well as marked categories, and in particular deconstructing heterosexuality first or at least concurrently with deconstructing marginalized sexual identities, *see supra* note 2, this essay describes its methodology as intersectional (or interSEXional) despite its focus on some privileged categories.

12. InterSEXionality is a term coined by the University of Denver faculty reading group as we planned this conference. The term is intended to invoke multiple levels of intersectional analysis while focusing on sexual orientation. First, it explores ways in which legal regulations invoke race, class, gender, sex, sexuality, and other identity categories, focusing on sexual orientation as the hub of the analysis. Second, InterSEXionality engages interdisciplinary methods to understand how various identities interact under legal regulation. In particular, InterSEXionality applies insights of queer theory (which actively contests identity categories) to legal analysis (which is firmly grounded in identity categories). Third, and perhaps most ambitiously, InterSEXionality explores interrelationships among ostensibly separate identity categories such as sex, gender, sexuality, and sexual orientation.

13. *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* THE LESBIAN AND GAY STUDIES READER 227 (Henry Abelove et al. eds., 1993) [hereinafter Rich, *Compulsory Heterosexuality*].

14. *See* JUDITH BUTLER, GENDER TROUBLE 141 (1990) [hereinafter BUTLER, GENDER TROUBLE]; Judith Butler, *Imitation and Gender Insubordination*, *in* INSIDE OUT: LESBIAN THEORIES, GAY THEORIES 13, 19 (Diana Fuss ed., 1991) [hereinafter Butler, *Imitation*].

15. *See supra* note 10.

16. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 6 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 129 (1995) [hereinafter Valdes, *Queers, Sissies, Dykes and Tomboys*]; *see also* Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 211 (1996) [hereinafter Valdes, *Unpacking Hetero-Patriarchy*].

17. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1494–95 (1993).

route for gay/lesbian liberation.[18] Finally, Part III briefly explores the feasibility and some implications of applying PSAs to same-sex relationships. If commercializing marriage through PSAs has at least some of the effects suggested, PSAs could well contribute to the transformation of marriage, perhaps reconstructing it into an institution in which the spouses are more equal than they are currently. PSAs, moreover, would shift the focus of marriage doctrine away from sex and gender and toward the economic aspects of the relationship. If PSAs could queer legal doctrine regulating marriage, they would make an important contribution toward reconstructing marriage. This reconstructed institution would further the goals of queer theory by subverting the construction of marriage (and heterosexual coupling) as natural. Once heterosexuality loses its naturalized status, legal regulations that penalize same-sex sexuality as deviant lose their justification. In short, queer legal theorists could make significant headway toward their ultimate goals by focusing on the (often unexamined) legal regulations governing heterosexual marriage.

## I. PREMARITAL SECURITY AGREEMENTS DESCRIBED AND APPLIED

### A. *Defining Premarital Security Agreements*

Premarital Security Agreements mirror commercial security agreements. In a typical secured transaction, a creditor extends credit to a debtor, who grants the creditor a security interest in collateral to secure repayment of the loan. Article 9 of the Uniform Commercial Code generally governs secured transactions when the collateral is personal prop-

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18. This essay assumes that queer theorists care about race and class. This assumption, like any other assertion about queers or queer theory is made difficult by queer theory's deliberate refusal to define "queer." Some people define queer as not fitting in to the mainstream, and define the queer community as an "oxymoronic community"

> of men, women, transsexuals, gay males, lesbians, bisexuals, straight men and women, African Americans, Chicanos, Asian Americans, Native Americans, people who can see and/or walk and people who cannot, welfare recipients, trust fund recipients, wage earners, Democrats, Republicans, and anarchists—to name a few . . . . Indeed, since difference from the "norm" is about all that many people in the "gay community" have in common with each other, these sorts of "gay and lesbian" gatherings, at their best and worst and most radical, seem to be spaces where cross-sections of the human mulitverse can gather together to thrash out differences and perhaps to lay the groundwork for peaceful and productive futures. . . . In my most naively hopeful moments, I often imagine it will be the "queer community"—the oxymoronic community of difference—that might be able to teach the world how to get along.

Lisa Duggan, *Making it Perfectly Queer*, *in* SEX WARS, *supra* note 2, at 155, 163 (quoting Louise Sloan, *Beyond Dialogue*, S.F. BAY GUARDIAN LITERARY SUPPLEMENT, Mar. 1991, at 3). Suzanna Danuta Walters offers the following critique of queer theory:

> [I]f all that we share is a nonnormative sexuality and a disenfranchisement, then why not be totally inclusive? This reduces queer politics to a banal (and potentially dangerous) politics of simple opposition, potentially affiliating groups, identities, and practices that are explicitly and implicitly in opposition to each other. To link politically and theoretically around a "difference" from normative heterosexuality imposes a (false) unity around disparate practices and communities.

Suzanna Danuta Walters, *From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?)*, 21 SIGNS 830, 838–39 (1996).

erty.[19] The security interest can arise in several ways: the creditor can take possession of the collateral, the parties can execute a writing (the security agreement), or the interest can arise as a matter of law.[20] Executing a writing is the typical way to create the security interest. Once a lender has the status of a secured creditor, it can, upon default, repossess the collateral.[21] While not without its critics,[22] this arrangement has served both debtors and creditors by facilitating the extension of credit and by protecting creditors against the risks of default.

I have argued elsewhere that contemporary marriage resembles this credit relationship in several respects.[23] In many marriages, one spouse is the primary wage-earner and the other spouse is primarily responsible for childcare and other homemaking tasks. Joan Williams has dubbed this marriage between an ideal worker and primary homemaker "the dominant family ecology."[24] Under this arrangement, the primary homemaker contributes to family wealth by supporting her spouse's efforts to become an ideal worker. Specifically, the primary homemaker performs domestic services that enable the primary wage-earner's full-time, year-round participation in the wage labor force, and in doing so she also incurs lost opportunity costs by devoting primary attention to her spouse's income potential instead of her own. The homemaker thus extends credit to her primary wage-earning spouse, expecting to be repaid by sharing the primary wage-earner's income over the course of the wage-earner's career. Unfortunately for primary homemakers and their children,[25] distribution of family assets and liabilities at divorce does not reflect these homemaker contributions to family wealth. Since the major asset in most divorces is

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19. *See* U.C.C. § 9-102 (1995) ("[T]his Article applies . . . to any transaction . . . which is intended to create a security interest in personal property.").

20. *See* U.C.C. § 9-203 (1995) (describing how security interests arise under Article 9 by either possession of collateral or a signed writing describing the collateral); U.C.C. § 9-310 (1995) (recognizing statutory liens).

21. U.C.C. § 9-503 (1995) (allowing a secured creditor to take possession of collateral without judicial process if repossession can be accomplished without breach of the peace).

22. *See, e.g.*, Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549, 550–51 (1997) (suggesting that Article 9 be amended to define specific actions which constitute breach of the peace).

23. *See* Ertman, *Commercializing Marriage*, *supra* note 4.

24. Williams, *supra* note 6, at 2229. The paradigmatic marriage in which women are financially dependent on men may be most prevalent among white middle and upper middle class marriages. *See* Twila L. Perry, *Alimony: Race, Privilege and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2486–89 (1994). In African American marriages, in contrast, there is less of a wage gap between men and women, and women are likely to contribute 40 percent of household income, compared to the 29 percent contributed on average by white wives. Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 793, 795–96 (1997).

25. Mothers are much more likely to be awarded custody of children of the marriage upon divorce. Williams, *supra* note 6, at 2227 n.144 (stating that "fathers gain sole physical custody in less than 10% of divorces" (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 112 (1992))).

the primary wage-earner's stream of income,[26] it is particularly unfair that this asset is usually allocated entirely to the primary wage-earner.

One reason that homemaker contributions to the wage-earner's income stream have not been valued at divorce is the difficulty encountered in precise quantification of the homemaker's contribution. Precise valuation is elusive because the value of homemaking can be calculated in at least three different ways: the cost of replacing a homemaker's services with market labor; the lost opportunity costs borne by the homemaker; and/or econometric methods based on economic theory and statistical analysis.[27] While the lost opportunity cost model is popular among some commentators,[28] it also has been criticized by feminists because it focuses only on costs borne by homemakers and fails to account for the benefits primary wage-earners enjoy as a result of traditional gendered divisions of domestic labor.[29] Rough figures for quantifying the way that primary wage-earners benefit from their spouses' homemaking are suggested by two studies indicating that men whose wives do not participate in the wage labor force earn 20-25 percent more than men whose wives work for wages.[30] I propose a formula for calculating the debt that accounts for this research. The debt is calculated as annual payments of 30 percent of the difference between the spouses' incomes at the time of divorce, paid for a period equal to half the marriage plus the time until the youngest child turns 18. This formula accounts for primary homemakers' decreased wages due to their focus on homemaking rather than wage labor,[31] for the contributions custodians of young children make to their former spouses' post-divorce income, and also for the pre-divorce contributions of primary homemakers in marriages that end after the children are grown.[32] While inexact, this valuation of homemaker

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26. Williams, *supra* note 6, at 2229.

27. *See* C.C. Fischer, *The Valuation of Household Production: Divorce, Wrongful Injury and Death Litigation*, 53 AM. J. ECON. & SOC. 187 (1994) (examining valuation of overall "household production" by applying methods of forensic economics).

28. *See, e.g.*, Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 54–55 (1989).

29. *See, e.g.*, Singer, *supra* note 3, at 2444–47.

30. Joy A. Schneer & Freida Reitman, *Effects of Alternative Family Structures on Managerial Career Paths*, 36 ACAD. MGMT. J. 830, 831 (1993) (finding that male MBA degree holders with homemaker spouses and children made 20 percent more than men whose spouses worked for wages); Linda K. Stroh & Jeanne M. Brett, *The Dual-Earner Dad Penalty in Salary Progression*, 35 HUM. RESOURCE MGMT. 181, 195 (1996) (study showing that managers whose wives did not work enjoyed 11 percent more in salary increases over five years than managers whose wives worked for wages); *see also* Tamar Lewin, *Men Whose Wives Work Earn Less, Studies Show*, N.Y. TIMES, Oct. 12, 1994, at A1.

31. Remunerating primary homemakers for their contributions to family wealth through homemaking services and lost opportunity costs makes particular sense in light of the second shift that most women work in order to make up for their male partner's more modest involvement with household management. HOCHSCHILD, *supra* note 5, at 8.

32. For further discussion of the formula, see Ertman, *Commercializing Marriage*, *supra* note 4, at 43–50.

contributions to family wealth improves on the current default rule, which fails in most circumstances to place any value on home-making.[33]

In short, PSAs would quantify the primary wage-earner's debt to the primary homemaker and designate 50 percent of all marital property as collateral securing the debt.[34] Dissolution of the marriage would be the equivalent of default on a commercial loan, giving the primary homemaker, like any other secured creditor, the right to repossess and dispose of the collateral to satisfy the debt.[35]

PSAs, like commercial security agreements, can arise in two ways: either through a writing conveying the security interest, or as a matter of law. If PSAs are created through a signed writing, that writing should describe the collateral. In either case the debtor must have an interest in the collateral and the creditor must give value.[36] Creating the PSA through a signed writing would be simple, since fiancées could sign the security agreement when they execute other documents necessary to obtain a marriage license. In the alternative, PSAs could arise as a matter of law, either through common law or statute. Statutory liens, for example, grant an auto mechanic a security interest in the automobile to secure payment for repair services.[37] Society should have at least as strong an interest in valuing homemaker contributions to family wealth as it does in protecting the auto repair business. There are advantages and disadvantages to each method of creating PSAs, but on balance a signed writing is preferable for purposes of both record keeping and allowing spouses to tailor their conduct during marriage to achieve desired results in the event of divorce.[38] To the extent that queer theorists have a stake in how PSAs are created, they might prefer a PSA created through a signed

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33. Alimony is awarded in a minority of divorces. Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1106 (1989) (describing United States Census Bureau data indicating that 9.3 percent of women were awarded permanent alimony between 1887 and 1906, 15.4 percent in 1916, 14.6 percent in 1922, compared to Lenore Weitzman's data indicating that in 1968 less than 19 percent of divorcees were awarded alimony and, in 1977, only 16.5 percent of divorces included alimony awards).

34. It is important to note that the debt and the collateral are separate. Fifty percent of marital property is collateral securing the loan. Because the most important asset in most divorces is the post-divorce stream of income, my proposal designates part of post-divorce income as marital property. The debt, or actual loan, is considerably smaller. Ertman, *Commercializing Marriage*, *supra* note 4, at 52–53. Commercial creditors typically oversecure a loan with collateral worth more than the loan amount to ensure full repayment of the debt.

35. Tangible marital property could be repossessed and sold pursuant to U.C.C. §§ 9-503 and 504 (1995). Intangible property, such as stream of income, could be accessed through garnishment proceedings. Garnishment is already used to satisfy child support and maintenance obligations. *See, e.g.*, COLO. REV. STAT. § 14-14-111.5 (1997) (authorizing income assignment to collect child support and maintenance).

36. U.C.C. § 9-203 (1995).

37. *See, e.g.*, COLO. REV. STAT. §§ 38-20-106 to -116 (1997); *see also* COLO. REV. STAT. § 42-9-104(II) (1997) (establishing liens on property such as motor vehicles upon which repair work has been done but not paid for).

38. Ertman, *Commercializing Marriage*, *supra* note 4, at 55–57.

writing to one arising as a matter of law because executing the writing could destabilize gender hierarchies by making the spouses aware of the way that PSAs alter power differentials between spouses, and also could increase the possibility of men doing more homemaking in order to avoid the security interest in their post-divorce income.[39]

Whether PSAs are created by a signed writing or by operation of law, they would dramatically improve the financial situation of many primary homemakers. Women, on average, suffer a marked decrease in standard of living after divorce, while men enjoy a marked increase in post-divorce standard of living.[40] The Displaced Homemaker Network has reported that 57 percent of all displaced homemakers live in or near poverty, and that divorced women of color disproportionately suffer from impoverishment.[41] This gendered disparity in post-divorce standards of living could be due at least in part to statutory provisions which discourage long-term alimony.[42]

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39. Queer theorists also might prefer consensual security agreements because they do not turn on the status of the parties in the same way that repair and mechanics' liens do. *See* U.C.C. § 9-102 cmt. 2 (1995). On the other hand, statutory liens become common knowledge after sustained use in the community, so that PSAs could affect the gendered nature of marriage even if they arose as a matter of law. Some queer theorists might, moreover, contest the distinction between the two ways of creating a security interest, arguing that the consensual nature of an executed security agreement is largely illusory given the state monopoly on recognizing marriage and allocating benefits based on it, paired with the forces of compulsory heterosexuality that push many people into marriage.

40. Lenore Weitzman's famous data suggested that, upon divorce, women's standard of living decreases 73 percent while men's standard of living increases 42 percent. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 338–39 (1985). Subsequent studies indicate that divorced women suffer a financial penalty (albeit less of one than that claimed by Weitzman). *See, e.g.*, Richard R. Peterson, *A Re-evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 530–33 (1996) (replicating Weitzman's research on the same data and finding a 27 percent decrease in women's standard of living and a 10 percent improvement for men); Lenore J. Weitzman, *The Econmic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOC. REV. 537, 537–38 (1996) (contending that original data no longer exist but conceding a sample weighting error); *see also* Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988) (finding that women suffer an approximately 30 percent drop in their standard of living in the first year after divorce).

41. Starnes, *supra* note 3, at 79–80 (citing the Displaced Homemakers Network 1990 Status Report which states that 61 percent of African American and 62.3 percent of Hispanic displaced homemakers are poor, compared to 27.8 percent of white displaced homemakers).

42. Section 308 of the Uniform Marriage and Divorce Act (U.M.D.A.) provides that a court should order maintenance

> only if . . . the spouse seeking maintenance: (1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

UNIF. MARRIAGE & DIVORCE ACT § 308(a) (amended 1973), 9A(I) U.L.A. 446 (1998). U.M.D.A. § 308 further directs courts to take into account six factors in determining the amount and duration of maintenance, including:

> (1) the financial resources of the party seeking maintenance . . . ; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age and physical and emotional condition of the

In commercial terms this pattern suggests a market failure in current divorce doctrine: Homemakers are extending credit to enable their spouses to become ideal workers, but many are not getting repaid. By allocating the risk of loss to the primary homemaker, current alimony doctrine both discourages people from being primary homemakers and gives primary wage-earners a windfall by allowing them to walk away from marriage with family wealth attributable to homemaker contributions. While numerous scholars bemoan the current divorce standards which devalue homemaking (reflecting and perpetuating the general devaluation of women's labor), no single proposal for remunerating homemaking has won support across the ideological spectrum.

### B. *Premarital Security Agreements' Crossover Potential*

Commentators have suggested divorce reforms that could correct this market failure. Proposals include reinstituting fault-based divorce (or at least strengthening fault-based alimony),[43] redefining family property to include the primary wage-earner's post-divorce income,[44] reconceptualizing family as a mother and child unit and supporting this unit through the public fisc,[45] and using partnership and contract principles to divide gains and losses due to gendered divisions of wage labor and primary homemaking.[46] While all of these proposals share the insight that homemaking should be valued at divorce, none of the proposals has garnered universal support. This lack of consensus is largely due to ideological dif-

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spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

*Id.* § 308(b). Although the U.M.D.A. uses the term "maintenance" to describe post-divorce payments from one spouse to another, this essay generally uses the term "alimony," as do most of the participants in the theoretical debate about post-divorce income-sharing. While practice distinguishes sharply between alimony and property division, experts have faltered when pressed to distinguish clearly between the two. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 592–93 (2d ed. 1987). Accordingly, while this essay focuses on alimony, the PSA could as easily be classified as a division of property.

43. *See, e.g.*, Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 BYU J. PUB. L. 91, 93 (1993).

44. *See* Williams, *supra* note 6, at 2258.

45. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 230–31 (1995).

46. *See, e.g.*, Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 885 (1988) (stating that no-fault "alimony, like contract damages, emphasizes restitution," and that the law analogizes marriage to a business partnership); Lloyd Cohen, *Marriage, Divorce and Quasi-Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEG. STUD. 267 (1987) (comparing the marriage contract to a commercial contract); Ellman, *supra* note 28, at 9–10 (criticizing the application of contract and partnership concepts to alimony and proposing a lost opportunity cost model); Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 252, 255–71 (1989) (exploring various theories upon which to fashion practical distinctions between property division entitlements and spousal support obligations); Singer, *supra* note 33, at 1114 (suggesting an investment partnership model of marriage); Starnes, *supra* note 3, at 108–09 (proposing a business partnership model for valuing homemaking).

ferences among the proposals. As I have argued elsewhere, PSAs have the potential to attract the cross over appeal that has eluded other proposals.[47]

Most of the proposals for reinvigorating alimony are either legal economic or cultural feminist.[48] Legal economic approaches tend to focus on efficiency and deterring opportunism in marriage. Some legal economic approaches are also traditionalist, and make normative and positive claims about gendered specialization in marriage.[49] Cultural feminist approaches seek to value homemaking contributions to family wealth, and in doing so protect women and their children from indigency and near-indigency.[50] Liberal feminist approaches, in contrast, take the formal equality position that both men and women should be encouraged to share equally in wage and homemaking labor. Liberal feminist scholars thus worry that generous alimony rules would encourage women to adopt traditional gender roles and remain dependent on men.[51] Finally, radical

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47. Ertman, *Commercializing Marriage*, *supra* note 4, at 63–97.

48. These labels are inevitably reductionist and do not (nor are they intended to) reflect the full range of feminist or legal economic thought. They do, however, give a sense of the ideological variation in approaches to divorce reform. For further discussion of these ideological approaches, see *id.* at 66, 74–75, 76–79, 88–92.

49. Legal economic approaches include Kristian Bolin, *The Marriage Contract and Efficient Rules for Spousal Support*, 14 INT'L REV. L. & ECON. 493, 501 (1994); Brinig & Carbone, *supra* note 46, at 901–02; June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 414–15 (1994); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 958–61 (1991); Cohen, *supra* note 46, at 303; Ellman, *supra* note 28, at 11; Joan M. Krauskopf, *Recompense for Financing Spouses' Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 416 (1980); Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEG. STUD. 35, 62 (1978); Parkman, *supra* note 43, at 93; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 94 (1990).

50. Feminist approaches can be described in different ways. *See, e.g.*, MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 67–118 (1994) (excerpting six feminist approaches, including the dominance critique of formal equality, a defense of formal equality, hedonic feminism, pragmatism, socialist feminism, and postmodern feminism). This essay and *Commercializing Marriage*, *supra* note 4, define liberal feminism as an approach which supports legal rules that treat men and women similarly in most situations, cultural feminism as an approach that seeks to value the work that most women do in the home (and workplace), and radical feminism as an approach that seeks to deconstruct the dualities of sex, gender, and sexual orientation that inform the discourse of gender and sex equality. Ertman, *Commercializing Marriage*, *supra* note 4, at 27–28.

Cultural feminist approaches include ideas suggested in FINEMAN, *supra* note 45, at 232; Ann Lacquer Estin, *Can Families Be Efficient?*, 4 MICH. J. GENDER & L. 1–2 (1996); Ann Lacquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 519–20 (1995); Ann Lacquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1086 (1995); Ann Lacquer Estin, *Maintenance, Alimony and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 803 (1993); Singer, *supra* note 3, at 2423; Singer, *supra* note 33, at 1121; Starnes, *supra* note 3, at 71–72; Williams, *supra* note 6, at 2227.

51. *See, e.g.*, Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 319 (1987); Herma Hill Kay, *Beyond No-Fault Divorce: New Directions in Divorce Reform*, *in* DIVORCE REFORM AT THE CROSSROADS 6, 36 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 90 (1987); Krauskopf, *supra* note 46, at 277–78; Perry, *supra* note 24, at 2519; J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1102–03 (1990); Barbara Stark, *Burning*

feminist analysis (at least the current, poststructural, version of radical feminism) rejects the dualism of male/female roles and fixed identity generally. Instead of freeing women *to* be women (cultural feminism) or *from* being women (liberal feminism), 1990s radical feminism suggests inverting the categories to undermine gender and sex duality and create the possibility of an equalitarian model of marriage that does not depend on male and female roles.[52]

I have argued that PSAs might cohere with these four ideologically disparate schools of thought, or in the alternative that PSAs could be a procedural tool for implementing one of the other proposals.[53] PSAs' commercial origins and their power to efficiently deter wage-earner opportunism further the goals of legal economics. The way PSAs increase the value of caretaking might appeal to proponents of cultural feminism. While liberal feminist concerns are likely to arise around PSAs' potential to create incentives for women to adopt traditional gender roles, liberal feminist scholars might appreciate PSAs' parallel potential to create incentives for more equal distribution of homemaking and wage labor. Finally, PSAs also serve the interests of radical feminism by transforming the cultural category of economically vulnerable housewife into that of a powerful market player, the secured creditor. In sum, PSAs may have cross-over analytical appeal as a solution to the problems of displaced homemaker indigency and the general devaluation of women's work.

This essay extends the ideological crossover analysis to queer theory, exploring whether PSAs might also cohere with queer legal theory. In doing so, this essay breaks new ground in its application of queer theoretical insights to heterosexual family law problems, a considerable extension beyond the usual focus of queer theory on gay/lesbian/ bisexual/transgendered issues.

## II. PREMARITAL SECURITY AGREEMENTS' APPLICABILITY TO QUEER LEGAL THEORY

Queer legal theory builds on the insights of poststructuralism, feminist and critical race theory, as well as critical legal studies to critique

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*Down the House: Toward a Theory of More Equitable Distribution*, 40 RUTGERS L. REV. 1173, 1207 (1988).

52. Radical feminist scholars have been largely silent in this discussion, with notable exceptions. *See, e.g.*, Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973 (1995) [hereinafter *Patriarchy Is Such a Drag*]. Some approaches combine cultural and radical feminist elements. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY 47, 176 (1991); JOAN WILLIAMS, UNBENDING GENDER: MARKET WORK AND FAMILY WORK IN THE 20TH CENTURY (forthcoming 1999); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2215 (1995); Williams, *supra* note 6, at 2229.

53. Ertman, *Commercializing Marriage*, *supra* note 4, at 63–97, 110–11.

legal theory and doctrine based on their impact on gay people.[54] In doing so, queer legal theory focuses on issues of identity, specifically how legal regulations turn on identity. Still in its infancy (some would argue, still gestating), queer legal theory remains in a state of flux. At this moment, one of its key challenges is to theorize the legal relevance of intersecting identities.[55] Queer theory thus builds on intersectionality theory,[56] striving to account for the ways that legal theory and doctrine can account for each person's multiple identities (such as gender, sex, race, class, and sexual orientation).[57] Queer theorists have coined various terms to describe this post-intersectional approach, including interconnectivity,[58]

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54. I use the term "gay people" rather than "queers" because most queer theory scholarship focuses on gay men and lesbians. *See, e.g.*, Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1462 (1992); Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 161.

55. Two other fora also have addressed these issues. This topic was the subject of a program sponsored by the Sections on Gay and Lesbian Issues and Minority Groups titled *Race, Ethnicity and Sexual Orientation: Crossing New Intersections in Law and Scholarship* at the 1998 Annual Meeting of the Association of American Law Schools. The Hastings Law Journal also sponsored a symposium titled *Intersexions: The Legal & Social Construction of Sexual Orientation*, 48 HASTINGS L.J. 1101 (1997). Most relevant for purposes of the present symposium on InterSEXionality are the Hastings Law Journal symposium articles focusing on intersections of race, ethnicity, class, gender and sexual orientation. *See* Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363 (1997); Ruth Colker, *Sexual Orientation: Militarism, Moralism, and Capitalism*, 48 HASTINGS L.J 1201 (1997); Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223 (1997); Kwan, *supra* note 11; Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation,"* 48 HASTINGS L.J. 1293 (1997) [hereinafter Valdes, *Queer Margins*].

It is important to note that not all queer theorists contest all categories. *See, e.g.*, DAN DANIELSEN & KAREN ENGLE, AFTER IDENTITY at xv (1995) ("Post-identity scholars articulate a set of strategies that acknowledge our simultaneous and ambivalent desire both to affirm our identities and to transcend them."); Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43, 56, 65 (1994) (suggesting that, unlike the category *woman*, the category *lesbian* is a coherent basis for lesbian legal theory because (1) "[t]he category lesbian is too young to be destabilized," and (2) lesbians share a "core experience" of experiencing and understanding "that transformative moment [of] realiz[ing] . . . personal erotic attraction to another woman").

56. The ground breaking piece on intersectional theory is Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

57. Jane Schacter has argued that the anti-gay "discourse of equivalents" compares different groups in order to decide who is entitled to civil rights protections, thus missing both commonalties and differences between different forms of subordination. *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 314 (1994) ("While all struggles for social justice must be waged with these links in mind, being connected and being identical are not the same thing.").

58. Valdes proposes interconnectivity as a theoretical approach which he describes as

> an inter-group ethic in legal scholarship that values and promotes sex/gender inclusiveness in critical endeavors—projects that interrogate not only the way in which a construct like "gender" affects various groups, but that also interrogate the way in which sites of oppression are structured, deployed, and operated under the conflation in interconnected ways.

Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 211; *see also* Valdes, *Queer Margins*, *supra* note 55, at 1341 ("[S]econd stage theorizing must go beyond a mere application of conventional

multidimensionality,[59] and cosynthesis.[60] The *Denver University Law Review*'s InterSEXionality Symposium is one more attempt to theorize legal approaches to these fundamental problems.

### A. *Compulsory Heterosexuality and Gender Subordination in Marriage*

Exposing legal regimes that constitute and enforce compulsory heterosexuality can be viewed as a key function of queer legal theory.[61] Thus, queer theorists might support PSAs to the extent that PSAs reveal, contest, and undermine compulsory heterosexuality.[62] If PSAs contribute to exposing, challenging, and eroding compulsory heterosexuality, they both queer legal theory and reconstruct marriage doctrine.[63]

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intersectionality to race, ethnicity, and sexual orientation. . . . [A] simple extension . . . is unworkable because the doctrinal potency of intersectionality depends on the formal illegality of all biases under inspection.").

59. *See* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 640 (1997) (defining multidimensionality as "a discursive project aimed at unveiling the complexity of subordination and identity and reshaping legal theory to reflect and respond to this complexity"); *see also* Berta Esperanza Hernández-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69, 71 (1996) (pointing out that multidemensionality incorporates many categories and is not limited to race and ethnicity). Pragmatism might offer a way to understand differences and similarities between and among groups. Scott Brewer et al., *Afterword: Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1911, 1928 (1990) (providing transcription of remarks by Jean C. Love, February 23–24, 1990, University of Southern California Law Center) ("Pragmatism has encouraged us to create a common language and in this way has helped us move toward a common understanding of the problem [of oppression based on sex, race, religion and sexual orientation].").

60. *See* Kwan, *supra* note 11, at 1281 ("By paying attention to the cosynthesis of categories, one opens up spaces for conceptualizing identities that do not prioritize one category over others.").

61. By explicitly identifying the compulsory nature of social systems that comprise heterosexuality, Adrienne Rich could be described as the grandmother of queer theory. But two considerations call this genealogy into question. First, Rich might object to lumping together lesbians and gay men, let alone all stigmatized sexual minorities. *See* Rich, *Compulsory Heterosexuality*, *supra* note 13, at 239 (distinguishing lesbian existence from male homosexuality). Rich, however, has softened her stance since writing *Compulsory Heterosexuality*, suggesting in a 1986 annotation to the essay that both lesbian identity and "the complex 'gay' identity we share with gay men" are relevant. *Id.* at 253 n.47. Second, Eve Kosofsky Sedgwick has been accorded the honor of being dubbed the mother of queer theory. *See* Duggan, *supra* note 2, at 182. Moreover, Rich's statements in *Compulsory Heterosexuality* likely rankle many a contemporary queer theorist as essentialist. *See, e.g.*, Valdes, *supra* note 55, at 1329 ("Queer values, sensibilities and imperatives are . . . suspicious of all essentializing categorization."). Despite these potential difficulties, this essay persists in understanding Rich's contribution as an absolute prerequisite to the insights of queer theory. Designating Rich as the grandmother of queer theory emphasizes the generational specificity of much of queer theory (i.e., the relative youth of many of its proponents), and places some distance between her and contemporary queer theorists while still recognizing her unique contributions to queer theory's basic precepts.

62. Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 170 (discussing compulsory heterosexuality in terms of hetero-patriarchy).

63. But PSAs paradoxically could also support compulsory heterosexuality. This essay addresses each possibility in turn.

1. Premarital Security Agreements Could Undermine Compulsory Heterosexuality

PSAs could undermine compulsory heterosexuality in both theoretical and practical ways. On a theoretical level, PSAs undermine compulsory heterosexuality by framing marriage as a political and economic institution. As a practical matter, PSAs subvert compulsory heterosexuality by making many women in marriage more economically powerful (and thus expanding female exit options).

First, PSAs undermine compulsory heterosexuality by revealing the political and economic aspects of marriage. Adrienne Rich emphasizes that "[w]e need an economics which comprehends the institution of heterosexuality, with its doubled workload for women and its sexual divisions of labor, as the most idealized of economic institutions."[64] PSAs have the potential to affect both the political and economic aspects of the "doubled workload for women and [the] sexual divisions of labor" within marriage. Economically, PSAs make the primary homemaker a secured creditor with the right to collect the debt upon dissolution. Thus PSAs make her an economically powerful party in the marriage, a secured creditor in relation to her debtor/primary wage-earning spouse. PSAs also reveal and improve the political implications of marriage for women. As a secured creditor, the primary homemaker enjoys a powerful role, particularly in relation to her primary-wage earning spouse. The PSA tempers the weakness of the homemaker role (gendered female and associated with domestic concerns) by adding to it the powerful role of a secured creditor, one associated with the market (and thus gendered male). By importing a commercial model into marriage and assigning the primary homemaker a powerful commercial role, PSAs thus lessen power imbalances in the home by adding power to the homemaker's role and taking some away from the wage-earner's role. In doing so, PSAs treat marriage as an economic institution, and destabilize the political and economic power of the traditional marital roles.

Second, PSAs could undermine compulsory heterosexuality to the extent that they alleviate the economic dependence of many wives on their husbands, thus expanding homemakers' exit options. Rich defines compulsory heterosexuality as, among other things, "a means of assuring male right of physical, economic and emotional access" to women.[65] As long as many women have few reasonable alternatives to marriage, and social and legal forces penalize them from exiting marriage, marriage remains compulsory.

64. Rich, *Compulsory Heterosexuality*, *supra* note 13, at 245.
65. *Id.* at 238.

Rich identifies some social forces that push women to marry:

> Women have married because it was necessary, in order to survive economically, in order to have children who would not suffer economic deprivation or social ostracism, in order to remain respectable, in order to do what was expected of women, because coming out of "abnormal" childhoods they wanted to feel "normal" and because heterosexual romance has been represented as the great female adventure, duty and fulfillment.[66]

A queer legal analysis of the compulsory nature of heterosexuality might build on this analysis by focusing on exit options. If a legal doctrine facilitates (rather than frustrates) a woman's exit from marriage, that doctrine undermines compulsory heterosexuality.

The current legal rule, which provides for only minimal post-divorce income sharing, reinforces compulsory heterosexuality by penalizing homemakers who exit marriage. The primary homemaker loses her share of the primary wage-earner's income because legal doctrine disregards homemaking contributions to that income. Consistent with Rich's analysis of compulsory heterosexuality's corrosive effects on women's freedom, this rule keeps women (particularly women in traditional gendered roles) in marriages by economically penalizing them for leaving. Replacing the current standard with PSAs could undermine compulsory heterosexuality by valuing homemaking labor, and remedying the injustice of the current rule. PSAs, unlike contemporary divorce doctrine, allow a traditional wife to exit marriage without substantial financial penalty. As such, PSAs arguably serve queer theory's agenda of countering compulsory heterosexuality.

A third way to understand PSAs' potential to undermine compulsory heterosexuality turns on the sex discrimination embedded in legal doctrine governing marriage. Andrew Koppelman has suggested that heterosexual marriage is grounded on (white) male supremacist ideals, so that the ban on gay marriage is sex discrimination.[67] He, like Nancy Chodorow, reasons that traditional gender roles in marriage perpetuate sexism by creating a family environment in which women are primary caretakers and men must individuate from their mothers in order to develop a mature sense of self.[68] Thus a legal rule which encourages men to play primary caretaking roles might incrementally alleviate sexism by undermining this tension between boys and their mothers (and thus between men and women). PSAs have the potential to further these ends in two ways. They create an incentive for men to increase caretaking, either

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66. *Id.* at 242.

67. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 201 (1994).

68. *See* Nancy Chodorow, *Family Structure and Feminine Personality*, *in* WOMAN, CULTURE, AND SOCIETY 43, 66 (Michelle Zimbalist Rosaldo & Louise Lamphere eds., 1974).

by being primary caretakers (because doing so is economically and socially valued through PSAs), or by more evenly dividing caretaking responsibilities than they do now (to minimize the debt and thus evade the security interest in post-divorce income). In sum, by creating incentives for male homemaking, treating marriage as an explicitly economic and political institution, and increasing exit options for traditional women in marriage, PSAs have the potential to undermine compulsory heterosexuality.

2. Premarital Security Agreements Paradoxically Might Support Compulsory Heterosexuality

While PSAs have the potential to undermine compulsory heterosexuality, PSAs also could support compulsory heterosexuality in at least three ways: (1) PSAs' focus on marriage may contribute to compulsory heterosexuality by perpetuating the invisibility of lesbian existence;[69] (2) even if more men became the primary caretakers due to the effect of PSAs they could remain in power;[70] and/or (3) PSAs could strengthen traditional marriage by creating incentives for spouses to embrace traditional gender roles and tying a homemaker's economic situation to that of her husband.[71] These considerations suggest PSAs could have a more complex interaction with compulsory heterosexuality than suggested above.

The first reason that queer theorists might see PSAs as supporting compulsory heterosexuality is their complicit erasure of same-sex possibilities. This criticism recognizes the problems of attempting to alleviate the effects of compulsory heterosexuality by reforming marriage, an institution both closed to gay men and lesbians and historically a corner-

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69. *See, e.g.*, Rich, *Compulsory Heterosexuality*, *supra* note 13, at 227.

70. *Id.* at 232.

71. A fourth consideration suggests that the current alimony doctrine is not always a tool of compulsory heterosexuality in that it provides that alimony be terminated or decreased if the recipient remarries or cohabits with a romantic partner. UNIF. MARRIAGE & DIVORCE ACT § 316(b), 9A(II) U.L.A. 102 (1998) ("Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the . . . remarriage of the party receiving maintenance."). Sections 5.08 and 5.10 of the Proposed Final Draft of the ALI DRAFT PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (1997) provide that post-divorce income sharing terminates when the recipient remarries or cohabits (whether the cohabitation is opposite-sex or same-sex). As discussed above, the general rule disfavoring alimony supports compulsory heterosexuality by penalizing primary homemakers for leaving the marriage. But the U.M.D.A. provision cutting off alimony upon remarriage discourages some heterosexual coupling. PSAs could similarly have complex interactions with compulsory heterosexuality. On one hand, the stream of payments under PSAs would continue even after the primary homemaker remarried, so that PSAs arguably might discourage less heterosexual coupling than the current regime. On the other hand, a divorcee could remarry without affecting her entitlement to a share of her former husband's income, making remarriage more a matter of choice (and thus less compulsory). Moreover, because PSAs increase homemakers' exit options in marriage, and few women are awarded or collect alimony under the current regime, the net effect of PSAs could be a decrease in the compulsory nature of heterosexuality.

stone of female and racial subordination.[72] But perhaps queer theorists have been overly shy about addressing heterosexual marriage reform. Given the commonly accepted construction of heterosexuality as natural, queer theorists should deconstruct heterosexuality first, or at least concurrently with marginalized sexual orientations.[73] By deconstructing and reconstructing heterosexuality, PSAs have the potential to highlight economic aspects of marriage, and thus alter the legal understanding of marriage to center more on financial aspects of the relationship than on the gender or sexual identity of the spouses. Once legal regulation of marriage is less sexed and gendered, the notion of lesbian and gay marriage becomes socially comprehensible. While same-sex marriage is not capable of making all gay people full legal subjects,[74] it would increase the cultural visibility of gay men and lesbians generally. Some feminists even argue that remunerating homemaking labor facilitates lesbian existence in that it enables women to come out as lesbians by giving them the economic opportunity to do so.[75]

The second reason queer theorists might question PSAs' ability to undermine compulsory heterosexuality focuses on whether PSAs have sufficient power to change gender and sexual dominance, even if they have the power to create incentives for men to be more gendered female and redefine the role of homemaker to make it more gendered male by associating it with market power. Men could retain their superordinate

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72. *See, e.g.*, DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 53–69 (2d ed. 1980) (describing the rise and fall of miscegenation doctrine); Koppelman, *supra* note 67; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (describing nineteenth-century doctrinal developments which preserved gender hierarchies in marriage by eliminating overt hierarchical arrangements but retaining gendered rules governing domestic labor and domestic violence); *see also* Lea Vandervelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997) (analyzing how the *Dred Scott* case might have come out differently had Harriet Robinson Scott been the focus of the case rather than her husband, and in doing so revealing profound racial and gender implications of nineteenth century marriage doctrine).

73. *See* Duggan, *supra* note 2, at 182 (noting the danger of deconstructing homosexuality without similarly deconstructing heterosexuality).

74. Hutchinson, *supra* note 59, at 589–90 (noting that social and economic forces would still function to oppress many gay people even if same-sex marriage were legalized). In a similar vein, I have argued that the process of gay people attaining full legal personhood may be gradual, stopping in contract along the way from public condemnation to full legal protections under doctrines such as marriage. *See* Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1110 (1996) [hereinafter Ertman, *Contractual Purgatory*].

75. *See* Lesbian Women, Power of Women Collective, *Lesbian Women: Love and Power*, *in* ALL WORK AND NO PAY: WOMEN, HOUSEWORK, AND THE WAGES DUE 46, 48 (Wendy Edmond & Suzie Fleming eds., 1975). As one commentator noted in *Lesbian Women: Love and Power*:

> We are fighting for Wages for Housework because this struggle will enable millions of other women to join us—to identify our struggles and our lives with their own, and, in many cases, to become lesbian. Thousands of lesbian women are shut behind doors with their children, only waiting for a bit of power to be able to come out.

*Id.*

social and economic position even if they were primary caretakers,[76] leaving women subordinate in their new, market role as primary wage-earners.[77] Gendered hierarchies may be so entrenched that one gender will always be on the bottom. But this possibility should not discourage all efforts to realign gendered power differentials. The gender status quo hurts women (as well as gay people), so there is reason to chance a reform even if doing so carries the risk of unintended consequences. Perhaps PSAs would lead some men to become increasingly gendered female, and others to remain primarily gendered male. Such a mixture of responses would preclude a monolithic redistribution of male power to homemaking from the market. Indeed, PSAs could have a range of different consequences and therefore appeal to a broad ideological spectrum of people.[78] If PSAs affect different people in different ways, then they are not a monolithic solution, but rather one way to destabilize traditional constructions of sex, gender, and sexual orientation and to create a more eclectic set of domestic arrangements and social views thereof.

The third and most serious reason that queer legal theorists might object to PSAs stems from PSAs' potential to encourage both men and women to play traditional gender roles. By compensating women who play traditional gender roles in marriage, PSAs arguably buttress compulsory heterosexuality. As I have argued elsewhere, some traditionalist legal economists might appreciate the way that PSAs cohere with what they see as biologically determined traditional gender roles by providing disincentives for wage-earning husbands to opportunistically abandon their homemaking wives.[79] If PSAs keep women and men in marriage (in traditional marriages, no less), then PSAs arguably strengthen rather than undermine compulsory heterosexuality. As Jane Schacter points out, this may well be the case.[80] But there are good reasons to suspect that PSAs are at least as likely to redefine traditional marriage as they are to reinforce it.[81] Given that the status quo of legal doctrine governing marriage is already hostile to gay people (through, for example, the ban on same-sex marriage) and women generally, it seems worth the risk to tinker

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76. *See* Rich, *Compulsory Heterosexuality*, *supra* note 13, at 232.

77. For a version of this scenario, see *If Men Could Menstruate*, *in* GLORIA STEINEM, OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 366 (2d ed. 1995). Steinem suggests that power differentials might remain even if male and female biological traits were reversed, satirically predicting that if, for example, men could menstruate,

> [g]enerals, right-wing politicians, and religious fundamentalists would cite menstruation ("*men*-struation") as proof that only men could serve God and country in combat ("You have to give blood to take blood"), occupy high political office ("Can women be properly fierce without a monthly cycle governed by the planet Mars?"), be priests, ministers, God Himself ("He gave this blood for our sins"), or rabbis ("Without a monthly purge of impurities, women are unclean").

*Id.* at 367.

78. *See* Ertman, *Commercializing Marriage*, *supra* note 4, at 96.

79. *Id.* at 72–73.

80. *See* Jane S. Schacter, *Taking the Intersexional Imperative Seriously: Sexual Orientation and Marriage Reform*, 75 DENV. U. L. REV. 1255, 1257–58 (1998).

81. *See* Ertman, *Commercializing Marriage*, *supra* note 4, at 75–76, 92–97.

with it. If nothing else, even a change that turns out to operate to the disadvantage of women and gay people creates a precedent for further changes, some of which might be more successful.[82]

In sum, queer theorists may justifiably suspect that PSAs could unintentionally strengthen compulsory heterosexuality by furthering gay people's invisibility and supporting traditional heterosexual marriage. Because of this dual possibility that PSAs could strengthen or undermine compulsory heterosexuality (or do both), further exploration is necessary to evaluate whether PSAs are appropriate tools to further the goals of queer legal theory.

### B. *Premarital Security Agreements As Instruments of Gender Performativity and Strategic Provisionality*

Judith Butler's revolutionary theory of gender performativity (and her related proposal that radical reforms be strategically provisional) informs nearly every queer theory discussion. PSAs further the goals of queer legal theory by accounting for gender performativity and being strategically provisional.

#### 1. Gender Performativity

In *Gender Trouble*, Butler suggests that gender is performative, and that drag has the subversive potential to reveal this performativity.[83] Drag reveals that there is no such thing as a prepolitical, essential, or natural gender, but rather that representations of gender are an attempt to enact a mythical ideal.[84] PSAs could implement Butler's theory of gender performativity by intervening in the constructed female gender role of wife, adding economic and social power to the wifely accoutrements of dependence and powerlessness, thus simultaneously undermining the naturalized hierarchies of market/family and male/female that currently construct heterosexuality as biological, imperative, and necessarily hierarchical.

Repetition is key to Butler's theory of gender performativity. Butler identifies the "critical task for feminism" as "locat[ing] strategies of subversive repetition enabled by those [constructed identities], to affirm

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82. While I am sympathetic to Schacter's insight that "[r]etrenchment can be pretty bleak," Schacter, *supra* note 80, at 1258, this risk might be balanced by the tremendous promise in altering naturalized constructions of marriage. The no-fault revolution in divorce might not have uniformly helped women, but it did go a long way toward desanctifying the legal regulation of marriage, thus contributing to a climate in which PSAs are conceivable.

83. BUTLER, GENDER TROUBLE, *supra* note 14, at 136–39.

84. *Id.* at 137–38. Butler has clarified that she does not see gender as a free choice, akin to the way one chooses to wear a dress or trousers each morning. To the contrary, gender norms are part of what determine the subject, and thus constrain the range of choice one can exercise in performing a gender. JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" at x–xi (1993).

local possibilities of intervention through participating in precisely those practices of repetition that constitute identity and, therefore, present the immanent possibility of contesting them."[85] In other words, Butler suggests that feminists identify opportunities for subversive repetition of identity constructions, repeat those identity constructions, and in doing so reveal identity to be socially constructed rather than natural.[86]

In this same vein, Butler points out that "heterosexualized genders" are "*a kind of imitation for which there is no original*; in fact, [they are] a kind of imitation that produces the very notion of the original as an *effect* and consequence of the imitation itself."[87] Within Butler's analysis "heterosexuality is always in the process of imitating and approximating its own phantasmatic idealization of itself—*and failing*."[88] Legal rules which expose heterosexuality's perpetual, always unsuccessful, attempt to enact a mythical ideal demonstrate the performative nature of both gender and heterosexuality. Since heterosexuality is constructed as the original sexuality (rendering alternatives such as homosexuality poor copies thereof), queer theorists should welcome any legal interventions that undermine the naturalized status of heterosexuality.

By inserting an economic creditor/debtor model into heterosexual marriage, PSAs do just this. Redefining primary homemakers as secured creditors and primary wage-earners as debtors reveals the economic nature of the transaction between these two players and inverts existing power dynamics. It moreover subverts the dichotomous hierarchy of market over family by importing market roles to the family relationship. Investing politically and economically weak players (here, homemakers) with the powerful attributes of a market player also erodes the hierarchy of male power over women (sometimes masked as protectiveness) by blurring the very boundaries between public and private, male and female, and market and family, that legitimate the hierarchy. By injecting this economic model (and giving the homemaker the more powerful role), PSAs also demonstrate that the complementary roles of gendered domestic life are neither natural, essential, nor inevitable. Instead, they are economic, and subject to regulation and change just as any other economic institution.

PSAs further undermine the naturalized status of marriage by revealing the performative nature of both gender and of heterosexuality.

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85. BUTLER, GENDER TROUBLE, *supra* note 14, at 147.

86. The repetition is endless, since

> [g]ender is a complexity whose totality is permanently deferred, never fully what it is at any given juncture in time. An open coalition, then, will affirm identities that are alternately instituted and relinquished according to the purposes at hand; it will be an open assemblage that permits of multiple convergences and divergences without obedience to a normative telos of definitional closure.

*Id.* at 16.

87. Butler, *Imitation*, *supra* note 14, at 21.

88. *Id.*

Traditionally *homemaker* is constructed as married, female, and working for love rather than remuneration. PSAs intervene in the perpetual repetition of this homemaker role, adding the twists that the homemaker's domestic labors are commodified and that she is a secured creditor. Combining the (feminine) domestic role with the (masculine) market accoutrements of a secured creditor, the creditor/homemaker role reveals the constructed nature of domestic roles. Like a drag queen, the creditor/homemaker "juxtapos[es] gender norms and gender deviance to destabilize the whole structure."[89] The homemaker thus destabilizes the symbiotic hierarchies of male/female and market/family. This new creditor/homemaker identity contributes to a radical redefinition of both male and female gender, and also demonstrates that there is nothing natural, biological, or essential about either gender or heterosexuality.

PSAs also could reflect the performativity of masculine gender roles and have the practical impact of creating incentives for heterosexual men (perhaps unwittingly) to further some objectives of queer theory. If homemaking labor came with the security and status of a premarital security interest, perhaps more men would be interested in the job. PSAs thus might contribute to the erosion of gender hierarchy by undermining gendered specialization of labor in marriage. Once marriage strays from gendered specialization, marriage is less gendered, and thus can more easily accommodate same-sex couples. Feminists and queer theorists have long recognized marriage's deeply patriarchal characteristics.[90] If PSAs made men more likely to participate in homemaking (either primarily or equally with their wives), then PSAs could further the queer theoretical goal of undermining the cultural meaning of marriage (and heterosexuality generally) as the only natural sexuality, grounded in biologically based complementarity of sexual and gender roles.

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89. *Patriarchy Is Such a Drag*, *supra* note 52, at 2004.

90. These inequalities in marriage are deeply rooted. Claude Levi-Strauss described marriage as the exchange of women, a process in which women are gifts men give to one another to solidify male-male alliances. *See* Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, *in* TOWARD AN ANTHROPOLOGY OF WOMEN 157, 173 (Rayna R. Reiter ed., 1975) ("[M]arriages are a most basic form of gift exchange, in which it is women who are the most precious of gifts." (articulating Levi-Strauss's theory of marriage as a form of gift exchange)). Under this analysis of marriage rituals, women are conduits to relationships between men rather than participants in the transaction, objects rather than subjects. *Id.* at 174 ("If it is women who are being transacted, then it is the men who give and take them who are linked, the woman being a conduit of a relationship rather than a partner to it.") While Levi-Strauss builds his argument that all kinship is based on men exchanging women from data gathered on non-industrial societies, remnants of the exchange model persist in contemporary America. Many married women do not participate in the wage labor force, marriage enhances men's market potential, and women do the lion's share of housework even when they do work outside the home. FUCHS, *supra* note 5, at 60, 83; HOCHSCHILD, *supra* note 5, at 8. The view of marriage as an exchange between men is further supported by elements of contemporary marriage such as the bride exchanging her father's last name for her husband's, and the father giving the bride to the husband during the wedding ceremony.

In sum, PSAs account for gender performativity by adding market accoutrements to the domestic roles of primary homemaker and primary wage-earner, and in doing so reveal that constructions of gendered labor specialization (and attendant power differentials) in marriage are malleable rather than natural or essential. PSAs thus deconstruct and reconstruct marriage by undermining doctrines which allocate family wealth at divorce in a way that values only market labor and thus perpetuates both homemaker dependency on primary wage-earners and the general devaluation of work deemed feminine. Remunerating "women's work" would go a long way toward queering legal doctrine that currently reflects and constitutes hierarchies in which masculinity and heterosexuality subordinate femininity and gay/lesbian existence.

2. Strategic Provisionality

In addition to incorporating gender performativity, PSAs are strategically provisional. The fundamental instability of identity is central to Butler's theory of gender performativity (and other poststructural approaches), and also central to queer theory. Yet legal theory relies heavily on notions of identity, posing serious impediments to importing queer theory into legal doctrine. A corporate officer's rights and duties, for example, are dictated by her officer status. Other legal rights and obligations often turn on sexual orientation status: Marriage, for example, has wide-ranging legal ramifications.[91] Queer theorists have criticized legal distinctions based on sexual orientation status as incoherent and illegitimate.[92] But it remains difficult to see how the law might recognize the personhood of gay people without invoking the very identity categories that queer theorists contend are instrumental to sexual orientation subordination. If, for example, Congress passed the Employment Non-Discrimination Act to amend Title VII of the Civil Rights Act of 1964 to include sexual orientation as a prohibited basis for employment decisions, this doctrinal change would simply add sexual orientation identity to the list of other identities that are protected against employment discrimination. PSAs might similarly graft creditor status onto the legal construction of homemaker and reify gendered specialization of labor in marriage.[93]

Some theorists suggest that selective use of identity categories, referred to as strategic essentialism, accommodates pragmatic political constraints while recognizing the power of queer theoretical deconstruc-

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91. For a list of marital rights, duties, and entitlements, see WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 66–70 (1996).

92. *See, e.g.*, Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1747–48 (1993).

93. Kwan, *supra* note 11, at 1276–77 (warning against the dangers of reifying marginalized identities through intersectional theory).

tion of identity categories.[94] But most queer theorists warn that strategic essentialism plays into power dynamics that disserve gay liberation.[95] Butler suggests that strategic essentialism risks its own violence, because in defining the members of any class who deserve protection against discrimination, inevitably someone will be left out.[96] As an alternative to strategic essentialism, Butler proposes strategic provisionality.[97]

Strategic provisionality involves using a sign in a way that does not foreclose future uses of the sign.[98] In other words, it recognizes the political necessity of using particular terms to describe identity, but anticipates that the identity's construction will change. In this way strategic provisionality counteracts the set of exclusions inherent in any identity-based classification by creating a status which is perpetually in flux. The question is whether the deep-seated essentialism in legal theory and doctrine can accommodate a changeable identity, one that is strategically provisional.

Janet Halley persuasively contends that legal theorists must transcend the impasse between essentialism and constructivism, and suggests focusing instead on the common ground between the essentialist and constructivist positions.[99] In pointing out that both essentialist and constructivist positions can be used to argue for either pro-gay or anti-gay

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94. Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Histioragraphy, in* SELECTED SUBALTERN STUDIES 3, 13–15 (Ranajit Guha & Gayatri Spivak eds., 1988). Judith Butler anticipates a more hostile response to identity deconstruction in a series of questions:

> But *politically*, we might argue, isn't it quite crucial to insist on lesbian and gay identities precisely because they are being threatened with erasure and obliteration from homophobic quarters? Isn't the above theory *complicitous* with those political forces that would obliterate the possibility of gay and lesbian identity? Isn't it "no accident" that such theoretical contestations of identity emerge within a political climate that is performing a set of similar obliterations of homosexual identities through legal and political means?

Butler, *Imitation*, *supra* note 14, at 19 (emphasis in original).

95. Richard Delgado offers an example of such a warning:

> The price of strategic essentialism is not only that you get away from your agenda and your heart-of-hearts goals. You'll develop what Antonio Gramsci calls false consciousness. You'll forget who you are and what your original goals and commitments were. . . . Spending time with Republicans means you will inevitably take on the mindset of a Republican. A Black man active in a white-dominated civil rights organization will eventually take on the traits and concerns he finds there. A Black woman working in a male-dominated group will risk losing her identity as a Black feminist. Some social scientists call this "alienation."

Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 653 (1993) (footnotes omitted).

96. Butler, *Imitation*, *supra* note 14, at 19 ("[A]ny consolidation of identity requires some set of differentiations and exclusions.").

97. *Id.* ("In avowing the sign's strategic provisionality (rather than its strategic essentialism), that identity can become a site of contest and revision, indeed, take on a future set of significations that those of us who use it now may not be able to foresee.").

98. *Id.*

99. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994).

policies,[100] Halley urges that pro-gay legal advocates abandon biological determinism and focus instead on "legal strategies that emphasize the political dynamics that inevitably attend sexual orientation identity—no matter how it is caused."[101]

In simultaneously entertaining identity and mutability, Halley's argument employs strategic provisionality. She proposes a "weak behavioral constructivism" which accommodates both essentialist and constructivist approaches:

> Those pre-committed to same-sex contacts might be pederasts, sodomites, mollies, berdache, inverts, homosexuals, gay men, lesbians, queers and so on. People's subjective experience of sexuality, and the behavior they undertake to support it, would be radically contingent on the identity offered by their culture for persons of their object choice and on their own opportunities for altering or shaping the options on offer.[102]

In other words, Halley's behavioral constructivism and Butler's strategic provisionality both seek to focus on political implications of culture rather than an essential, fixed identity to counteract gendered and heterosexualized power dynamics.

PSAs recognize some of these insights. They are deliberately agnostic about gender and seek to alter the construction of heterosexuality. In Butler's terms, PSAs do not foreclose "the future uses of the sign"[103] *homemaker*. Instead, they intervene in the current construction of gendered labor specialization in marriage as natural, transforming *homemaker* into a hybrid of domestic and market elements. Because PSAs anticipate that the reallocation of power and wealth in heterosexual families might change the allocation of domestic and market labor in marriage, they deliberately anticipate a fluctuating construction of *homemaker*.

In Halley's terms, PSAs make "[p]eople's subjective experience of sexuality, and the behavior they undertake to support it . . . [here, gendered specialization of labor in marriage] radically contingent on the identity offered by their culture for persons of their object choice."[104] Here, PSAs offer the cultural debtor/creditor roles to supplement the traditional wage-earner/homemaker roles. If *homemaker* has the cultural meanings associated with domesticity in which one labors for love rather than remuneration, then the subjective experience of heterosexual marriage is one of complementary roles in which market and home are both

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100. *Id.* at 517 (pointing out that "[n]either essentialism nor constructivism is *necessarily* gay-affirmative") (emphasis added)).

101. *Id.* at 506.

102. *Id.* at 561.

103. Butler, *Imitation*, *supra* note 14, at 19 (emphasis omitted).

104. Halley, *supra* note 99, at 561.

necessary, but market is culturally superior because labor there is rewarded with pay. If, however, *homemaker* is supplemented with some market characteristics by making the primary homemaker a secured creditor in relation to her primary wage-earning spouse, then the meaning of *homemaker* changes dramatically. This switch demonstrates that there is nothing natural, essential, prepolitical or inevitable about homemaking being unremunerated and less powerful. As such, PSAs treat gender and (heterosexual) sexual orientation as radically contingent on cultural forces.[105]

In sum, PSAs have the potential to queer marriage doctrine by both reflecting the insights of gender performativity and by being strategically provisional. By dressing homemakers as secured creditors and primary wage-earners as debtors, PSAs reveal the constructed nature of both gender roles and of traditional heterosexual marriage itself. They thus intervene in the current constructions of both gender and heterosexuality to undermine naturalized constructions. PSAs moreover implement Butler's strategic provisionality and Halley's behavioral constructivism in their simultaneous use of the categories homemaker and creditor in relation to the same subject and their refusal to essentialize any particular understanding of sex, gender, or sexual orientation (or, for that matter, debtor or creditor).

### C. *Premarital Security Agreements Might Queer the State*

Lisa Duggan's influential essay *Queering the State* urges queer theorists to engage on both theoretical and practical levels by importing the insights of queer theory into mainstream debate, emphasizing that "we *need* . . . to be both transformative *and* effective."[106] As Duggan acknowledges, though, there are significant barriers to direct importation. She illustrates this point by imagining a *Nightline* panel with prominent queer theorists discussing the military's ban on gay service members:

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105. Another level of strategic provisionality turns on PSAs' deliberate agnosticism about essentialist or constructivist understandings of sex and gender. As I describe at length in *Commercializing Marriage*, *supra* note 4, PSAs have the potential to either encourage or discourage traditional gender roles in marriage. Part of the reason that PSAs enjoy this flexibility (or, to put it negatively, indeterminacy) is that their predicted effects are determined by assumptions about sex and gender. If, for example, traditional gender roles are biologically determined (perhaps as a matter of sociobiological determination to maximize the chances that one's genes will be replicated in future gene pools), then women should play traditional roles regardless of legal incentives to do otherwise. Traditionalist legal economists take this position. If, on the other hand, gender is socially constructed and thus can be restructured based on legal incentives (as most feminists contend), then, given the right incentives, women might venture out into the wage labor force in a more focused way than many currently do. PSAs are malleable enough to accommodate both of these positions. Gender may be determined or not, and PSAs will protect the people (male or female) who play caretaking roles in marriage and family life. Thus, although Butler might object to PSAs' ability to accommodate essentialist notions of gender, she might appreciate their ability to serve both essentialist and constructionist notions of gender, thereby destabilizing either side's claim to truth.

106. Duggan, *supra* note 2, at 193.

> It is not that these figures would have nothing interesting or useful to say. They would simply have a great deal of trouble making themselves understood (as many of us in the field of queer studies would). The problems are on the levels both of cultural legibility and political palatability. Imagine Bersani: "As I argue, Ted, in my article 'Is the Rectum A Grave?' . . . The ensuing discussion of heteromasculinity's terror of penetration might put Ted in *his* grave."[107]

Because, as discussed above, PSAs import the insights of queer theory and also are mainstream in their focus on the value of homemaking, PSAs bridge this gap between theory and practice. PSAs might turn out to be both transformative and effective: transformative in the way they cohere with queer theory insights about gender performativity and strategic provisionality, and effective in their practical redistributive effects. PSAs, in short, appropriate liberal discourses toward radical ends.

As an example of appropriating liberal discourse to serve radical ends, Duggan suggests that queer activists borrow the liberal discourse of disestablishmentarianism in order to divert homophobic assaults on gay men and lesbians. Specifically, she suggests queer theorists and activists appropriate liberal arguments against a state-established religion to suggest that the state similarly separate itself from "the religion of heteronormativity."[108] Duggan explains that this strategy (which she dubs "No Promo Hetero"[109]) is "not a broad solution, but only a local tactic embedded in a larger strategy of destabilizing heteronormativity. It is one among many conceivable tactics."[110] Like Duggan's No Promo Hetero proposal, PSAs focus on heterosexuality, and apply queer theory to legal doctrine regulating heterosexuality. As such, they deconstruct heterosexuality first, attacking its naturalized position directly rather than by deconstructing gay and lesbian identities that are already marked as marginal.[111]

Duggan suggests that appropriating liberal discourse with a queer theory twist answers the need for "a less defensive, more politically self-assertive set of linguistic and conceptual tools to talk about sexual difference."[112] PSAs respond to the need for offensive rather than defensive approaches. Duggan urges queer theorists to apply high theory strategically, and activists to think beyond formal equality, in both cases borrowing from liberal discourses to redirect the debate about queer human-

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107. *Id.* at 183.

108. *Id.* at 189.

109. *Id.* at 188. Nan Hunter coined the phrase "No Promo Homo" to describe and critique "state-imposed penalties on identity speech—or speech that promotes or professes homosexuality." Nan D. Hunter, *Identity, Speech and Equality*, *in* SEX WARS, *supra* note 2, at 140. Duggan takes Hunter's insights a step further, suggesting that the state should adopt a policy of No Promo Hetero instead of merely refraining from suppressing the promotion of homosexuality.

110. Duggan, *supra* note 2, at 191–92.

111. *See id.* at 185.

112. *Id.* at 192. However, while Duggan focuses on the differences between heterosexuals and gay people, PSAs focus on the different situations of men and women in marriage.

ity's subject status.[113] Duggan is not suggesting that liberal discourse is the key to replacing heteronormativity with queer sensibilities, but rather that it is one way to translate the often arcane language of queer theory into mainstream discourse:

> The question is: At this historical moment, can we transform *any* liberal rhetoric in the interests ultimately of going beyond liberal categories and solutions? Or, given the difficulty of translating our most radical insights and arguments into effective discourse, can we afford not to try?[114]

PSAs similarly are not everything to everyone, but they have the potential to radically restructure the way we think about marriage and gender roles, and thus make some headway toward queer theory's goal of deconstructing "the natural and preferred status of heterosexuality."[115]

### D. *Premarital Security Agreements Are Doctrinal Interventions in Conflations of Sex, Gender, and Sexual Orientation*

A trilogy of recent articles similarly strives for an understanding of legal theory and doctrine that is both effective and transformative. In these articles Mary Anne Case,[116] Katherine Franke,[117] and Frank Valdes[118] have made important contributions to legal theoretical understanding of the intersections (or inter-connections) between sex, gender and sexual orientation.[119] Given that PSAs, too, strive to transform legal theory and doctrine as well as to achieve practical change benefiting marginalized people, the approaches of Case, Franke, and Valdes offer a yardstick for evaluating PSAs' relevance for queer legal theory. The depth and complexity of each scholar's approach justify a full article exploring the relationship among them, but such detail is beyond the scope of this essay. The purpose of this essay is instead to engage in a brief, inevitably reductionist, examination of how PSAs might cohere (or conflict) with Case's, Franke's, and Valdes's approaches to intersectionality.

One can read the Case, Franke, and Valdes trio of articles as advocating for an expanded understanding of sex discrimination law to include gender and/or sexual orientation discrimination. At this level, there is reason to believe that all three approaches may resonate with PSAs.

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113. Duggan, *supra* note 2, at 181–86.
114. *Id.* at 193.
115. *Id.* at 190.
116. Case, *supra* note 16.
117. Franke, *supra* note 16.
118. Valdes, *Queers, Sissies, Dykes, and Tomboys*, *supra* note 16.
119. While there is substantial overlap between their approaches, each can be said to focus on a different point in the triangle of sex, gender, and sexual orientation: Case on gender, Franke on sex, and Valdes on orientation. Case, *supra* note 16, at 105 n.39.

While Case, Franke, and Valdes all promote an expansive understanding of sex discrimination law that protects people from gender and sexual orientation as well as sex discrimination, each scholar takes a unique approach. The crux of Case's argument is that femininity (expressed by men or by women) should be protected.[120] Franke argues for an expanded understanding of sexual identity that goes beyond biology to include "a more behavioral or performative conception of sex."[121] Valdes contends that the law tolerates a great deal of sex and gender discrimination by labeling it sexual orientation discrimination.[122] A synthesis of Case's, Franke's and Valdes's approaches suggests that anti-discrimination law inaccurately perceives overlap and separation among sex, gender, and sexual orientation, and that it should instead understand sex discrimination to include protection for effeminate men, people whose gender does not match their sex, and gay people. PSAs share some commonality with all three approaches.

Case favors protecting those who exhibit feminine behavior from discrimination, reasoning that the world will be safe for women in "frilly pink dresses" when it is safe for men in dresses.[123] PSAs protect men as well as women who engage in homemaking, an activity which is arguably as feminine as wearing a dress.[124] PSAs moreover add a masculine (market) element to feminine homemaking conduct to remedy the financial straits of displaced homemakers and to increase the social value of women's work generally. Not unlike Case's proposal for protecting effeminate men in order to increase the social value ascribed to femininity,[125] PSAs alter the social meaning of homemaking by quantifying its contribution to family wealth and protecting the primary homemaker's interest in that investment with a security interest. If the in-

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120. Case contends that Title VII "correctly applied, already provide[s] the necessary protection to both effeminate men and feminine women, as well as their masculine counterparts." Case, *supra* note 16, at 4.

121. Franke, *supra* note 16, at 8.

122. Valdes, *Queers, Sissies, Dykes, and Tomboys*, *supra* note 16, at 17.

123. Case, *supra* note 16, at 7 ("It is my contention that, unfortunately, the world will not be safe for women in frilly pink dresses—they will not, for example, generally be as respected as either men or women in gray flannel suits—unless and until it is made safe for men in dresses as well.").

124. One could argue that dresses are unambiguous markers of femininity, while homemaking is behavior that both women and men engage in, albeit in varying degrees. In other words, a married father could leave the practice of law to teach secondary school in order to have more time with his children, and retain social ascriptions of masculinity. If, however, this same man substituted a golf skirt for khakis, or started sporting pearls, he would be subject to social penalties for transgressing sex/gender norms. This comparison may illustrate the differential penalties for various types of demasculinazation. The former lawyer may suffer economically for his family-driven career change, but also benefit socially both from the deeper relationship with his family and from social value ascribed to those men who demonstrate dedication to their families. The cross-dressing man, however, suffers both socially and economically, indicating that the sartorial elements of gender normativity may be stronger than those associated with participation in homemaking and wage-labor. *See* MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY 52–66 (1992) (analyzing historical examples of cross-dressing).

125. *See* Case, *supra* note 16, at 4.

creased economic and social valuation of homemaking induces some men to increase the time they devote to caring for their families, then PSAs could further contribute to the valuation of so-called women's work because more men would be doing it.[126] Thus, reforms which make the world safe for people (men or women) in aprons share the spirit of reforms that make it safe for anyone who wants to wear a frilly dress. In both cases, social roles that are stigmatized as feminine are redefined as at least partly masculine, and thus more valuable both socially and economically.

While Case seeks to value femininity by protecting men who exhibit it, Franke seeks to expand (and perhaps replace) the understanding of sex to include what we commonly think of as gender.[127] She contends that biological notions of sex allow considerable gender discrimination to go unchecked because "most, if not all, differences between men and women are grounded not in biology, but in gender normativity."[128] Franke prefers an understanding of sex discrimination that protects, in addition to transgendered people, "the male senior associate in a law firm who wants neither to be ridiculed by his male colleagues nor penalized when he comes up for partner because he requests time off from work to care for his newborn child."[129] Thus, Franke wants the law to account for gender performativity by protecting against discrimination based on gender normativity.[130]

Just as PSAs cohere with Case's argument that sex discrimination law should protect effeminate men, PSAs are consistent with Franke's suggestion that sex discrimination law should remedy injuries suffered as a result of hostility to gender non-conformity.[131] As discussed above, PSAs are consistent with Butler's theory of gender performativity, a theory which also informs Franke's approach.[132] PSAs account for the performativity of gender in the context of a traditional marriage. Under a PSA the primary homemaker's contributions to family wealth are recog-

126. While it is not clear whether "the feminine tend[s] to be devalued because it is associated with women, or . . . women [are] devalued because they manifest feminine characteristics," Case mines cross-cultural evidence to suggest that the "the stronger line of causation runs from a disfavoring of women." Case, *supra* note 16, at 33. Thus "feminine characteristics are devalued relative to masculine ones, to the detriment not only of men displaying those feminine characteristics but of women generally." *Id.* at 28.

127. Franke, *supra* note 16, at 3 ("[S]exual identity—that is, what it means to be a woman and what it means to be a man—must be understood not in deterministic, biological terms, but according to a set of behavioral, performative norms.").

128. *Id.* at 5.

129. *Id.* at 8–9.

130. Franke makes the important clarification that gender performativity does not mean that one dons a gender in the morning like an outfit; to the contrary, Butler's theory of gender performativity "regards gender norms as part of what determines the subject. As such, construction is a constitutive constraint." *Id.* at 50–51 n.211.

131. *Id.* at 1–3.

132. *Id.* at 51–58.

nized and remunerated by making the homemaker a secured creditor and her primary wage-earning spouse a debtor. This change reveals that the homemaker/wage-earner dyad is not natural, but rather economic and changeable. When homemakers are also secured creditors, heterosexuality itself is reconstructed as an economic, rather than natural, relationship. By combining these market and domestic roles, PSAs offer a way of thinking about marriage that is gendered rather than sexed, and in doing so support sex and gender equality. PSAs thus cohere with Franke's focus on a performative notion of sex and gender.

Just as PSAs are consistent with Case's focus on femininity and Franke's focus on gender performativity, PSAs also cohere with Valdes's focus on sexual orientation discrimination. Valdes argues that gender and sex discrimination often go undetected and unpunished when they seem to take the form of sexual orientation discrimination.[133] He proposes a triangular model in which sex, gender, and sexual orientation interact, and suggests that the legs of this triangle reveal legal and social conflations between the categories.[134] Valdes's point is that the law perpetuates compulsory heterosexuality through these conflations.[135]

Valdes's approach presupposes the desirability of legal doctrines which destabilize androsexism and heterosexism.[136] PSAs do just that. PSAs reconstruct the category *wife*, which currently is sexed woman, gendered female, and presupposes a heterosexual orientation. Under PSAs, *wife* becomes less gendered female when it is merged with the gendered male (market) category of secured creditor, because homemaking work is no longer done for only love but receives remuneration just as market labor does. Once *wife* becomes less gendered female, perhaps men will be less reluctant to engage in caretaking behavior, and *wife* may even come to represent the activities of caretaking rather than the sex of the person doing the homemaking. Finally, if *wife* ceases to be constructed as sexed and gendered female, then marriage itself undergoes a reconstruction. It would no longer be defined as requiring one gendered/sexed male and one gendered/sexed female, instead requiring two people engaged in wage labor and homemaking, perhaps equally and perhaps in a specialized way.

The reconstruction of marriage through PSAs could ultimately benefit many gay people. If PSAs replaced the current gendered focus of

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133. *See* Valdes, *Queers, Sissies, Dykes, and Tomboys*, *supra* note 16, at 17.

134. *Id.* at 13; Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 165.

135. Valdes, *Queers, Sissies, Dykes, and Tomboys*, *supra* note 16, at 42; Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 169 ("[T]he conflationary status quo represents a regime of compulsory hetero-patriarchy.").

136. *See* Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16 at 162–63 (contending that the critique of the Euro-American sex/gender system as neither ahistorical nor universal allows "critical reconsideration of the legal value of human desire and intimacy," and that such a critique could contribute to "chang[ing] law from an instrument of sex/gender oppression to an engine for sex/gender liberation").

marriage with an economic one, then PSAs also could contribute to a social climate in which same-sex marriage is no longer oxymoronic. In other words, if marriage is an economic relationship in which two people align to pool their economic and emotional resources (rather than primarily to beget and raise children in traditionally gendered roles),[137] then the ban on same-sex marriage loses much of its purpose. Thus PSAs offer a legal doctrine that intervenes in the conflation of sex, gender, and sexual orientation that Valdes posits is key to the subordination of women and sexual minorities.[138]

In sum, PSAs may queer legal theory by intervening in law's current conflation of sex, gender, and sexual orientation. By treating primary homemakers as secured creditors, they alleviate the indigency of displaced homemakers and value women's work. Moreover, PSAs cohere with Case's, Franke's, and Valdes's theoretical and doctrinal approaches to sex discrimination by counteracting economic penalties currently exacted on those who perform the feminine labor of homemaking, understanding gender as performative, and intervening in the construction of *wife* as sexed and gendered female and heterosexual. These effects are largely gender-related, but PSAs also contribute to a social and legal construction of marriage that could include same-sex marriage.

### E. *Premarital Security Agreements Could Contribute to the Push for Same-Sex Marriage*

William Eskridge has articulately made the case for same-sex marriage.[139] If PSAs focus on economic aspects of marriage (and downplay its gendered aspects), then they may contribute to creating a social climate capable of recognizing same-sex marriage. Mainstream opposition to same-sex marriage stems from a belief that it undermines the natural order of things, which is taken to be the state recognizing only those relationships between men and women entered into for the primary pur-

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137. The legislative history of the Defense of Marriage Act (D.O.M.A.) illustrates this construction of traditional heterosexual marriage. The House Report in support of the D.O.M.A. included the following statement: "Marriage is the central cultural recourse for reconciling men and women's separate natures and different reproductive strategies. Indeed, the most important purpose of marriage is to unite men and women in a formal partnership that will last through the prolonged period of dependency of a human child." H.R. REP. NO. 104-664, at 14 n.50 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2918 n.50 (quoting Barbara Dafoe Whitehead, *The War Between the Sexes*, 7 AM. ENTERPRISE 26 (1996)). Hadley Arkes, Edward Ney Professor of Jurisprudence and American Institutions, Amherst College similarly testified:

> [S]exuality [is] imprinted on our very natures—in the obdurate fact that we are, as the saying goes, "engendered." We are, each of us, born a man or a woman. . . . Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is to say the function and purpose of begetting.

*Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. of the House Comm. on the Judiciary*, 104th Cong. 99–100 (1996) (testimony of Hadley Arkes).

138. Valdes, *Unpacking Hetero-Patriarchy*, *supra* note 16, at 163.

139. ESKRIDGE, *supra* note 91; Eskridge, *supra* note 17, at 1419.

pose of begetting and raising children.[140] As long as marriage is constructed in this highly sexed and gendered way, same-sex marriage will remain oxymoronic.[141] If PSAs contribute to a legal regulation of marriage that focuses on economics rather than traditional gender roles, however, same-sex marriage makes more sense. Thus PSAs, despite their potential to reward wives in traditionally gendered marriages,[142] could paradoxically have the effect of contributing to social conditions that would allow for social recognition of same-sex marriage. While gay marriage is one of the most prominent items on the national agenda for gay rights, given the possibility that some states might lift the ban on same-sex marriage,[143] numerous commentators have suggested that there are significant pitfalls with putting gay marriage at the top of a gay rights agenda.

### F. *Queer Theory Qualms About Same-Sex Marriage*

Darren Hutchinson is one of many queer theorists to suggest that same-sex marriage may not be everything it is cracked up to be.[144]

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140. *See supra* note 137 (describing the legislative history of the Defense of Marriage Act).

141. Same-sex marriage may make more sense in many people's minds as the baby boom in the gay and lesbian community (dubbed the "gayby boom") takes hold in primary schools, emergency rooms, family law courts, and other arenas around the country. The idea of gay couples having children has penetrated the popular imagination through celebrity couples such as Melissa Etheridge and Julie Cypher, who demonstrated generous openness when they had publicly discussed their decision to have a child together. *See* Mark Miller, *We're a Family and We Have Rights*, NEWSWEEK, Nov. 4, 1996, at 54 (interviewing Melissa Etheridge and Julie Cypher). Once a critical mass of run-of-the-mill gay and lesbian couples begin interacting with PTA boards, school teachers, hospitals, and other social actors, parenthood may cease to be understood as unique to opposite sex couples. For further discussion of the way that the gayby boom could influence PSAs' applicability to same-sex couples, see *infra* Part III.

142. *See* Ertman, *Commercializing Marriage*, *supra* note 4.

143. This possibility became remote when Hawaii voters amended their constitution to authorize the state legislature to ban same-sex marriage. Sam Howe Verhovek, *The 1998 Elections: The States—Intitiatives*, N.Y. TIMES, Nov. 5, 1998, at B1. Alaska voters similarly intervened in marriage litigation by amending their constitution to define marriage as a union between a man and a woman. *Id.* However, same-sex marriage litigation continues in Vermont. *See* Gustav Niebuhr, *Laws Aside, Some in Clergy Quietly Bless Gay "Marriage,"* N.Y. TIMES, April 17, 1998, at A1.

144. *See* Hutchinson, *supra* note 59, at 586–602; *see also* Ruth Colker, *Marriage*, 3 YALE J.L. & FEMINISM 321, 326 (1991) ("[W]e should work to change the definition of family and the exclusive class-based ways that our society provides privileges, rather than encourage more people—gay or straight—to enter the institution of marriage."); Paula L. Ettelbrick, *Legal Marriage Is Not the Answer*, HARV. GAY & LESBIAN REV., Fall 1997, at 34 (arguing that "the battle for legal marriage is too narrow and too limited for our own community's interests, and that in pursuing it as our primary political objective we will rob ourselves of an important opportunity to challenge heterocentric sexual and family hierarchies"); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993) ("[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism."); Charles R. P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMPLE POL. & CIV. RTS. L. REV. 363, 370 (1998) ("The extension of same-sex marriage will cloak gay and lesbian couples in the traditions of patriarchy and heterosexism. Heterosexual norms

Hutchinson makes a powerful argument that focusing on marriage ignores the interests of many gays and lesbians of color and those who are poor. In other words, claims that gay people are "virtually normal," needing only marriage to bring them into the mainstream, misapprehend and further marginalize the experiences of many gay people.[145] Hutchinson argues that upper middle class white men would benefit more from marriage than many gay people of color and gay poor people. Specifically, he notes that the paradigmatic model of family as two spouses and their biological children overlooks the fact that "Africans, American blacks, and other non-white cultures place tremendous importance on 'extended families,' rather than rigid nuclear bodies."[146] Moreover, he points out that poor gay people would not be able to take advantage of many economic benefits of marriage.[147] Thus PSAs' focus on middle and upper middle class couples, coupled with some queer theorists' lack of enthusiasm about PSAs' potential to contribute to paving the path toward legal recognition of same-sex relationships, could prevent a number of queer theorists from embracing PSAs.

There is good reason to suspect that PSAs might exacerbate rather than alleviate the marginalization of poor people and many people of color. PSAs are based on a paradigmatic marriage comprised of a primary wage-earner and a primary homemaker where the wage-earner earns considerably higher wages than the homemaker. This model applies best in white middle and upper-middle class marriages, and has less applicability in communities of color where wage differences between men and women are less extreme than those between white men and women.[148] Moreover, women of color (both historically and currently) are more likely to participate in the wage labor force than white women, often doing domestic labor for wages.[149] Finally, poor women are more likely to marry poor men, making the redistribution of wage-earner income from men to women largely illusory for many women. For these reasons, there is reason to question whether PSAs can be said to be inter-SEXional given their modest interventions in (and possible support of) class and race hierarchies.

These concerns merit serious consideration. While PSAs may work best in white middle and upper-middle class marriages, they may also improve on current legal treatment of many people of color and poor people. First, the race and class critique applies to any post-divorce in-

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will become the standards applied to lesbian and gay relationships, and the development of queer cultural constructions of intimate relationships will be stunted.").

145. Hutchinson, *supra* note 59, at 597–98.

146. *See id.* at 592 (footnote omitted).

147. *See id.* at 593.

148. Brown, *supra* note 24, at 795–96; Perry, *supra* note 24, at 2486; *see also* Ertman, *Commercializing Marriage*, *supra* note 4, at 104–05.

149. Perry, *supra* note 24, at 2487–98; Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997).

come sharing proposal, suggesting that if these considerations prevent PSAs from queering legal theory then they would also prevent much privatized divorce reform from reconstructing marriage. Such an approach might overlook substantial benefits of PSAs that could outweigh these problems.

First, marriage likely has beneficial as well as marginalizing implications for poor people and many people of color. It might, for example, benefit some poor people who currently do not avail themselves of it. Cynthia Bowman has argued, for example, that common law marriage should be revitalized to protect the interests of poor women and many women of color who would not otherwise be entitled to enjoy state benefits such as Social Security and worker's compensation death benefits.[150] PSAs also could benefit middle, upper-middle, and working class women of color since women of color are much less likely to be awarded alimony than white women.[151] Moreover, PSAs could benefit many low-income women who would otherwise bear more than their share of marital debt upon divorce. If PSAs were treated as securing a debt of the primary wage-earner (or the non-homemaker if neither spouse is fully employed) to the primary homemaker, this marital debt could off-set the primary homemaker's liability for other marital debts.[152] Finally, on a macro level, PSAs could benefit the many poor women who perform domestic labor in other people's homes by increasing the social and economic value of that labor.[153] If PSAs increase the overall value of domestic labor, then they could result in an increase in the wages of domestic workers.

This survey of selected queer theoretical approaches suggests that PSAs have the potential to queer existing doctrine through an interSEXional approach. They have the potential to undermine compulsory heterosexuality, reflect a performative understanding of gender, queer the state, intervene in legal conflations of sex, gender, and sexual orientation, and contribute to the social and legal fight for same-sex marriage. While they may also inadvertently be manipulated to support compulsory heterosexuality by rewarding women in traditional gendered marriages and ratifying race and class hierarchies, these drawbacks should not prevent queer theorists from seriously considering PSAs as one doctrinal tool for

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150. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 762 (1997). Bowman discusses the racialized history of the repeal of common law marriage, including Louisiana's treatment of common law marriage in order to discourage manumission of slaves through liaisons between white men and female slaves. *See id.* at 737.

151. Perry, *supra* note 24, at 2483 (describing 1987 Census Bureau statistics that 18 percent of white women were awarded alimony, compared to less than 8 percent of African American women).

152. Ertman, *Commercializing Marriage*, *supra* note 4, at 105. Nancy Staudt similarly proposes to tax housework and create a household income tax credit. Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1630–31 (1996).

153. Achieving this goal would require that PSAs also intervene in the dichotomy between spiritual and menial housework, so that all homemaking would be commodified and valued. *See* Roberts, *supra* note 149.

queering legal theory by reconstructing marriage. Even if queer theorists reject PSAs, queer theorists should consider other proposals which aim to alter the unmarked, heterosexual categories prior to (or contemporaneously with) deconstructing gay/lesbian/bisexual, transgendered, and transsexual identity categories.

## III. PREMARITAL SECURITY AGREEMENTS IN SAME-SEX RELATIONSHIPS

Perhaps the most practical question for queer theorists who examine PSAs is whether PSAs would apply to same-sex relationships. While PSAs are modeled on heterosexual marriages (and traditionalist ones at that), they could be tailored to remunerate homemaking in gay and lesbian families. Differences between same-sex and heterosexual partnerships, however, suggest that PSAs might function better as the exception than as the rule in same-sex relationships.

One problem with directly importing PSAs to same-sex relationships is that PSAs are premised on a model of gendered specialization of labor in marriage. If lesbians and gay men are less specialized in their domestic roles, PSAs may have less applicability for gay and lesbian relationships than they do in heterosexual relationships. Empirical research suggests that same-sex relationships do tend to be less gendered than heterosexual ones,[154] so remunerating homemaking through PSAs simply might not reflect the typical same-sex relationship dynamic.

Research on how couples divide household chores indicates that lesbian and gay households tend to be less gendered in this way than heterosexual ones. This pattern is not surprising given the fact that, by definition, neither partner in a same-sex relationship is "the" man or "the" woman, so that tasks cannot be divided on those grounds. Perhaps because of this dynamic (coupled with many lesbians' feminism), lesbian

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154. *See* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 148–51 (1983) (suggesting that "same-sex couples cannot assign housework on the basis of who is male and who is female"); Lawrence A. Kurdek, *The Allocation of Household Labor in Gay, Lesbian, and Heterosexual Married Couples*, 49 J. SOC. ISSUES, Fall 1993, at 127, 138 (finding that gay and lesbian couples allocate household labor on bases other than gender); *see also* Janet Lever, *Lesbian Sex Survey*, ADVOCATE, Aug. 22, 1995, at 22. The *Advocate* survey indicates:

> There is very little evidence that images of masculinity or femininity relate to who takes the role of sexual aggressor within relationships. Who does the cooking is also unrelated to relative butch-femme ratings, but there is a strong correspondence to who does more driving—even being just somewhat more masculine than a partner puts one behind the wheel far more often.

*Id.* at 28. This data from the *Advocate* survey should, however, be taken in the context of respondents' demographics: The average age was 34; 86 percent of the respondents were white (compared to 8 percent Hispanic/Latina, 2 percent African American or black, 1 percent Native American, 1 percent Asian, and 2 percent "other"); nearly two-thirds had at least a college degree and more than 25 percent had a graduate degree (compared to 14 percent of American women holding a bachelor's degree and 6 percent having an advanced degree); and the average personal income was $32,000. *Id.* at 25.

and gay couples tend to "strive for egalitarian relationships," and are less marked by power imbalances than heterosexual relationships.[155] This situation is further facilitated by the fact that same-sex partners tend to have similar options for wage labor, and thus are relative financial equals. As a result of these factors, housework is negotiated rather than sex-based, and same-sex partners tend to compensate one partner who expends more time on homemaking labor.[156]

A related difference between heterosexual and same-sex couples is that same-sex couples generally expect both partners to be self-supporting.[157] While gay men seem somewhat more tolerant of playing the provider role than lesbians are, same-sex couples generally are more stable when both partners contribute equally or proportionately to the household.[158] Although same-sex couples tend to share homemaking and wage-earning tasks more equally than heterosexual partners, in both kinds of relationships there is a direct relationship between hours worked in the wage labor market and the amount of homemaking a partner does. In other words, the partner who works more does less homemaking.[159] This common pattern suggests that PSAs might be most justified in the same-sex relationship context where one partner is less than fully employed for a significant period of time. Raising a child could be one of the circumstances in which this type of pattern might emerge in same-sex relationships.

However, having children seems to be more the exception than the rule in same-sex relationships.[160] As such, assuming that childcare (actual

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155. *See* Michelle Huston & Pepper Schwartz, *The Relationships of Lesbians and Gay Men*, *in* UNDER-STUDIED RELATIONSHIPS: OFF THE BEATEN TRACK 89, 108–11 (Julia T. Wood & Steve Duck eds., 1995). *But see* Nancy E. Murphy, Note, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335, 340 & nn.34, 36 (citing CLAIRE M. RENZETTI, VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS (1992) in asserting that domestic violence in same-sex relationships occurs with the same frequency and in a similar manner as domestic violence occurring in opposite-sex relationships).

156. Huston & Schwartz, *supra* note 155, at 108–11.

157. In particular,

> Both gay and lesbian partners will engage in the provider role, but they each prefer a co-provider situation. Gay men, like other men, do not expect that a provider will take care of them. When one gay partner is the provider, the partner who is being provided for tends to be more dissatisfied with the situation. In contrast, lesbians do not expect to support another person financially, except temporarily. Lesbians are not socialized, as many men are, to take pleasure in a paternalistic provider role. A lesbian who finds herself in the role of provider is likely to be the more dissatisfied partner with the situation.

Virginia Rutter & Pepper Schwartz, *Same-Sex Couples: Courtship, Commitment, Context*, *in* THE DIVERSITY OF HUMAN RELATIONSHIPS 197, 209 (Ann Elisabeth Auhagen & Maria von Salisch eds., 1996).

158. *Id.*

159. BLUMSTEIN & SCHWARTZ, *supra* note 154, at 148–49.

160. Given the legal and social hostility to gay people caring for children, it is difficult to calculate the number of gay and lesbian parents. Certainly the number of same-sex couples with children seems to be on the rise. *See supra* note 141. But even if gay parenting is becoming

or anticipated) is a major reason that many married women devote primary attention to homemaking, perhaps it makes sense for PSAs to be the rule in heterosexual marriages and the exception in same-sex relationships. In either situation the spouses could contract around the rule (either by earning equivalent wages or through an express waiver of the PSA). Given that PSAs are firmly grounded in gendered allocations of homemaking and wage labor in most marriages, this differential application of PSAs makes more sense than applying them to all couples in the same way.[161] In any case, PSAs would not make much of a difference for most same-sex couples because the partners earn roughly equivalent wages, so that the formula for calculating the debt due to one partner as remuneration for specializing in homemaking would yield modest, if any, payments.

An additional barrier to applying PSAs to same-sex relationships is that, unlike heterosexual marriage, no state currently provides rules for either creating or dissolving gay or lesbian relationships (let alone the distribution of property or payment of alimony). States would have to recognize same-sex relationships before they could administer break-ups and apply the PSA as appropriate. Some states are moving in that direction with marriage litigation[162] and reciprocal beneficiaries legislation,[163] and other states, including Colorado, are exploring what kind of legislation should govern same-sex relationships.[164] It is important to note that state recognition of same-sex marriage (or domestic partnerships or reciprocal beneficiary relationships) does not dispose of the issue of whether such relationships should be governed by PSAs. Given the above discussion of the relative equality of partners in same-sex relationships, perhaps reverse default rules should govern heterosexual and same-sex marriages, at least regarding PSAs. However, even if PSAs were applied across the board, to both same-sex and heterosexual couples, much of the potential inapplicability of PSAs to same-sex relation-

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increasingly prevalent, it seems likely that a higher percentage of heterosexual couples (particularly those who are married) have children than same-sex couples.

161. For another gay-affirmative argument favoring differential treatment of same-sex and heterosexual couples, see Pouncy, *supra* note 144, at 370.

162. Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996) (enjoining the state from denying marriage licenses "solely because applicants are of the same sex"). While the Hawaii legislature may exercise its recently acquired power to ban same-sex marriage, Vermont's litigation continues apace. *See supra* note 143.

163. HAW. REV. STAT. § 572C (Supp. 1997).

164. Peggy Lowe, *Same-Sex Registrations Endorsed*, DENV. POST, July 9, 1998, at B1; GOVERNOR'S COMM'N ON THE RIGHTS AND RESPONSIBILITIES OF SAME-SEX RELATIONSIHPS, STATE OF COLO., REPORT, FINDINGS AND RECOMMENDATIONS (1998) (copy on file with the author). As a member of the legal subcommittee of Governor Romer's Commission on Rights and Responsibilities of Same-Sex Relationships, I participated in numerous spirited and nuanced debates about optimal state regulations of same-sex relationships. Like Jane Schacter, I prefer a legal regime which recognizes a "pluralism of affiliative structures." Schacter, *supra* note 80, at 1259. However, given the gendered divisions of labor upon which PSAs rest, PSAs might be more justified under a marriage model than within an alternative such as domestic partnership.

ships would be mooted by the partners' ability to contract around the PSA terms by conduct.

Finally, same-sex partners can resort to private law by contractually creating PSAs until such time as the state recognizes same-sex relationships. Courts tend to enforce same-sex relationship contracts, even when state statutes ban same-sex marriage or criminalize same-sex sexual activity.[165] Since gay couples must contractually create most family law rights, they (or their lawyers) could incorporate a PSA into cohabitation agreements.[166] For those couples with children, or who otherwise choose to specialize in wage and domestic labor, such contracting makes particular sense.

One final objection to adopting PSAs in same-sex relationships suggests that perhaps the gendered division of labor is not the best template to mimic.[167] But if couples are engaging in such specialization, the advisability of doing so is beside the point.

## CONCLUSION

Queer legal theorists should be interested in commercializing marriage through Premarital Security Agreements. PSAs recognize homemaker contributions to family wealth (specifically, primary-wage-earner income) by making the homemaker a creditor in relation to her primary wage-earning spouse. The amount of the wage-earner's debt could be calculated based on the difference between the spouses' income at divorce, the duration of the marriage, and the age of any minor children. This debt would be secured by 50 percent of all marital property. In the event of divorce, the primary homemaker, like any other secured creditor, could foreclose on that collateral in order to obtain her fair share of marital property.

In addition to deconstructing heterosexuality before, or at least concurrently with, deconstructing marginalized sexual orientations, PSAs queer legal doctrine governing marriage in a number of ways. First, they undermine compulsory heterosexuality. Second, they account for gender

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165. Ertman, *Contractual Purgatory*, *supra* note 74, at 1137–40 (discussing same-sex cohabitation contracts and the remarkable case *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992), in which the Georgia Supreme Court invoked the parol evidence rule to exclue evidence that a cohabitation contract between two women was based on "illegal and immoral" consideration). The Florida Court of Appeals similarly enforced a same-sex cohabitation contract, reasoning that:

> [E]ven though the state has prohibited same-sex marriages and same-sex adoptions, it has not prohibited this type of agreement. . . . Even though no legal rights or obligations flow as a matter of law from a non-marital relationship, we see no impediment to the parties to such a relationship agreeing between themselves to provide certain rights and obligations.

Posik v. Layton, 695 So. 2d 759, 761 (Fla. Dist. Ct. App. 1997); *see also* Silver v. Starrett, 674 N.Y.S.2d 915, 918 (Sup. Ct. 1998) ("In non-marital breakups, the law largely leaves the post-relationship consequences to such agreements as its parties may work out.").

166. This point also holds true for PSAs as applied to heterosexual couples. *See* Ertman, *Commercializing Marriage*, *supra* note 4, at 110.

167. *See supra* text accompanying note 79.

performativity and strategic provisionality. Third, they queer the state by using liberal constructs toward radical ends. Fourth, they intervene in legal conflations of sex, gender, and sexual orientation. Finally, by changing the focus of marriage doctrine from sex, gender, and sexual orientation to economics, PSAs could contribute to a social climate which recognizes same-sex marriage. Queer theorists could object to PSAs on the ground that PSAs could unintentionally support traditional gender roles or further marginalize poor people and/or many people of color, but the benefits of experimenting with divorce reform (and reconstructing marriage) outweigh inevitable risks that the reform might have unintended consequences.

As a doctrinal tool to implement some of the most radical insights of queer theory, PSAs have the potential to be both effective and transformative. But even if they do not achieve everything suggested in this essay, they could contribute to other, perhaps more effective and/or more transformative, measures changing the law of heterosexual marriage. The question is not whether PSAs resolve all the issues raised by queer legal theory, but rather whether we can afford not to seriously consider PSAs or other proposed reforms of marriage law.[168]

168. Duggan, *supra* note 2, at 193 ("The question is: At this historical moment, can we transform *any* liberal rhetoric in the interests ultimately of going beyond liberal categories and solutions? Or, given the difficulty or translating our most radical insights and arguments into effective public discourse, can we afford not to try?").

# TAKING THE INTERSEXIONAL IMPERATIVE SERIOUSLY: SEXUAL ORIENTATION AND MARRIAGE REFORM

JANE S. SCHACTER*

## I. INTRODUCTION

When we think about the construction of heterosexuality, we are always, if only implicitly, thinking too about the construction of alternative sexualities and of sexuality itself. The articles in this symposium by Professors Sterett and Ertman enrich our thinking about this fundamental inquiry in important ways. Professor Sterett, with her nuanced and textured historical analysis of the emergence of pension and other benefits, draws our attention to how the legal creation, regulation, and justification of state-sponsored benefits helped to shape and reinforce normative conceptions of gender and sexual orientation.[1] Professor Ertman, with her bold proposal for rectifying the longstanding, gendered economic inequalities associated with divorce, suggests that altering the terms on which marital relationships are conducted and severed might be part of *re*-constructing heterosexuality in significant ways.[2]

As I thought about these two articles, and particularly as I thought about them in juxtaposition to one another, they raised for me a question inspired by the idea of "interSEXionality" that is the organizing topic of this symposium. I take the intersexionality imperative, if we can speak of one, to include at least the notion that in assessing proposed legal interventions or reforms, we should consider the likely *intersexional effects*, if you will, of such proposals. How are particular legal strategies likely to affect not only the explicit problem to which they are immediately addressed, but the wider range of problems that are implicated by the complex links between and among related areas of concern? What, for example, might Professor Ertman's suggestion of a move to a regime of premarital security agreements mean for the construction of alternative—that is, non-dominant—sexualities?[3] This is a subject that Ertman herself addresses in considering how queer theorists might receive her proposal.[4]

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* Professor of Law, University of Michigan. Thanks to Juliet Brodie for her comments on an earlier draft, and to the participants in the InterSEXionality Symposium for many thought-provoking discussions.

1. *See* Susan Sterett, *Husbands & Wives, Dangerousness & Dependence: Public Pensions in the 1860s–1920s*, 75 DENV. U. L. REV. 1181 (1998).

2. *See* Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998) [hereinafter Ertman, *Reconstructing Marriage*]. For a more extended exploration of Ertman's proposal, see Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998).

3. *See* Ertman, *Reconstucting Marriage*, *supra* note 2, at 1216–17, 1219–26.

4. *See id.* at 1228–34.

In thinking about difficult questions like these, I want to consider more generally the problem of how to conceptualize and predict the intersexional effects of proposed legal reforms. This problem is, I think, part of a large and difficult set of questions for progressive legal scholars: How will particular strategies be received, understood, and shaped in the diffuse, collective social processes that give meaning to these strategies over time? Is it possible to maintain progressive "ownership" of particular strategies once they become part of these collective processes and thus become subject to *appropriation* by diverse forces and to *domestication* in ways that are sometimes hard to predict or control?

Professor Sterett's article provides a rich point of conceptual departure from which to pursue these questions, illuminating as it does how the legal device of the pension, and its doctrinal grounding, emerged within, and functioned to reinforce, a system of starkly gendered relations.[5] By tracing the ways in which pension benefits were justified and grounded in naturalized conceptions of masculinity and femininity, the article exposes important links between legal and cultural forces.[6] With this framework in mind, I will probe potential intersexional effects of, first, Professor Ertman's proposal for premarital security agreements, and second, some contemporary advocacy for same-sex marriage. My focus in terms of same-sex marriage will be on an intersection suggested by the Sterett and Ertman articles: the nexus between sexuality, gender, and poverty. I will explore the intersexional implications of some defenses of same-sex marriage for poor women and, in particular, poor women who are single mothers.

## II. THE PREMARITAL SECURITY AGREEMENT REGIME AND ASSESSING THE INTERSEXIONAL EFFECTS OF PROPOSED LEGAL REFORMS

Professor Ertman proposes to import the commercial law device of security agreements into the family law realm and to reconceive primary homemakers (usually women) as creditors and primary wage-earners (usually men) as debtors.[7] The move to a regime of premarital security agreements is, of course, motivated in the first instance by gender concerns, and more particularly by concerns for the impoverishing effect of divorce on women who have worked extensively or exclusively in the home, rather than the market. Ertman makes a strong case for how the effects of such agreements might ameliorate the economic inequities she identifies, and how, surprisingly, her proposal might even generate an ideologically diverse coalition of legal economists and feminists of varying stripes.[8]

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5. *See* Sterett, *supra* note 1.
6. *See id.*
7. *See* Ertman, *Reconstructing Marriage*, *supra* note 2, at 1216–17, 1219–26.
8. *See id.* at 1225–26.

I want to focus on the capacity of premarital security agreements to affect the nature and contours of gender relations, and in turn to participate in reshaping not only dominant conceptions of heterosexuality, but of alternative sexualities as well. How should we think about the capacity of the Ertman legal proposal to affect this broader range of social meanings and practices? On this point, the proposal strikes me as quite paradoxical in having the potential both to reinforce a deeply gendered status quo that supports heterosexual normativity *and* to open some dramatically liberatory paths away from that status quo.

The road to retrenchment lies, I fear, in the incentive structure created by the proposal. By attempting to ameliorate the economic inequalities that fall on homemakers, the proposal may *also* produce an economic incentive for women to remain or become full or part-time homemakers, with primary child care responsibilities and all that goes along with that. Making it financially more attractive to adopt that role may well reinforce the gendered status quo that is the subject of Professor Sterett's historical analysis—the status quo that sends more men into the market (Sterett's world of "danger")[9] and keeps more women in the home (Sterett's world of "dependency").[10] Reinforcing those gendered patterns, in turn, may well entrench cultural norms of femininity and masculinity—the very norms that Professor Sterett traces in her analysis of the gendered justification of early pension benefits. Doing so, moreover, might well shore up traditional gender scripts in ways that are distinctly inhospitable to the gender transgressions posed by non-heterosexuals.

Professor Ertman anticipates these issues in her article. She points out that her proposal is gender-neutral, and so might be thought to give men an incentive to abandon the market in favor of the home.[11] But while the legal proposal is gender-neutral, the world is not; indeed, just this fact is what moves Professor Ertman in the first instance. Absent cultural change to accompany legal change—a point I will discuss further—formal equality measures in a world of substantive inequality tend to reproduce the underlying inequalities, and to be shaped and driven by existing social dynamics.[12] Under current social conditions, in other words, premarital security agreements standing alone are more likely to track than to disrupt the gendered status quo.

Professor Ertman also argues that the additional "exit options"[13] that the premarital security interest will create may well empower women financially, and as a result, perhaps even culturally.[14] Here, though, I

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9. *See* Sterett, *supra* note 1, at 1187–93.

10. *See id.* at 1198–1204.

11. *See* Ertman, *Reconstructing Marriage*, *supra* note 2, at 1230–31.

12. For further discussion of this point, see Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil Rights Era*, 110 HARV. L. REV. 684, 721 (1997).

13. Ertman, *Reconstructing Marriage*, *supra* note 2, at 1229.

14. *Id.* at 1229–31.

think there is an important point to be made about the predictive enterprise I am suggesting. When we try to assess the intersexional effects of legal reforms, we need to think beyond the specific policy results that particular proposals can induce, such as giving women new financial advantages. We also need to consider self-consciously the cultural meaning that reforms are likely to have—that is, the larger public understandings that are likely to attach to measures like a premarital security agreement. Particularly because it may be that only a relatively small or demographically privileged group would actually use premarital security agreements,[15] the ways that these new agreements come to be publicly framed and perceived might prove to be more significant than any concrete effects that such agreements may produce for those who enter into them. And here there is risk, for it seems to me that the measure might well come to be understood to reflect, although it is surely not motivated by, a social commitment to gendered role division in heterosexual marriage. Indeed, Professor Ertman acknowledges this risk, yet argues that even a failed reform can be preferable to a bad status quo by creating the possibility of future change.[16] I am not so sure. Retrenchment can be pretty bleak.

There is, however, another way to think about how premarital security agreements, if operationalized, might come to be culturally understood, and here is where the paradox that I see arises. Perhaps the path charted by this proposal might be one that does not reinforce, but rather contributes to dislodging, the gendered status quo. What I find among the most conceptually appealing aspects of the proposal is the very act of importing commercial law into the realm of marriage, a realm that is conventionally regarded as sanctified and somehow above the nasty business of commerce. Reconceiving husbands and wives in the language of debtors and creditors, and inserting Article 9 security agreements into the cultural domain traditionally inhabited by vows and valentines, has the capacity to jolt and to challenge conventional understandings about what marriage *is*, what it *does*. Professor Ertman's proposal might thus contribute to the project—vital in my view—of demystifying marriage by reconceiving committed heterosexual partnerships in the frank and unadorned vocabulary of commercial exchange.[17]

Ertman's idea strikes me as one important part of a larger project of distinguishing the legal rights, benefits, and status of marriage, on the one hand, from the complex constellation of symbols, rituals, traditions, and various moral, religious, and social trappings of marriage, on the other hand. These two elements are conventionally, but unconvincingly,

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15. Ertman recognizes this potential limitation. *See id.* at 1249–50.

16. *Id.* at 1234.

17. For a historical analysis of the regulation of heterosexuality and a comprehensive argument in favor of applying a bargaining framework to the politics of heterosexuality, see LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX (1998).

presented as an undifferentiated whole. The sober scrutiny of marriage that is inherent in a proposal that emphasizes the commercial qualities and potentialities of marriage offers one way to press that point and to begin to break apart the contested meanings of marriage as an institution. Reconceiving and reconstructing marriage in this way, moreover, can contribute to creating a world that includes and enables what I think of as a genuine pluralism of affiliative structures. I use this term to describe a world in which marriage might coexist with a flexible domestic partnership structure that can accommodate partnerships of different sorts, established under different conditions, with widely different aspirations and conceptions of the good in mind.[18]

Which of these two paths—retrenchment or progress—could we expect a codified Ertman proposal to go down? It is hard to say, and I do not think this paradoxical set of potential intersexional consequences is at all unique to Ertman's proposal. This uncertainty will frequently arise where progressive legal reforms are concerned, which is just what makes this sort of inquiry complex. The basic dilemma is that the progressive roots and motivations of a particular legal reform might not be the forces that frame and determine that reform's meaning once it is operative. Worse still, *ex ante* predictions of this kind are elusive and difficult.

I do not suggest that we can eliminate uncertainty of this kind, but there a few ways to address and perhaps to ameliorate it. First, we should simply *think* about these questions directly. That is, we should ask the intersexional questions—as Professor Ertman laudably does in her contribution to this symposium—and should embrace and specifically consider the possibility that paradoxical consequences may flow from well-intentioned interventions. Launching this inquiry means making deliberative, though surely imperfect, judgments about how best to steer proposals in their intended direction. Second, we should recognize that legal strategies alone are often unlikely to be autonomous sources of deep social change, and have to be paired with cultural and other strategies, and conceptualized in terms of the dynamic, mutually constitutive relationship between legal and social forces.[19] All of this suggests to me that as we consider what road a premarital security agreement regime might take us down, we should think about accompanying strategies that can influence the outcome. For example, expressly situating the proposal within a package of comprehensive strategies aimed squarely at reconceiving the cultural meaning of marriage, or deliberately designing the proposal so that it might be used by unmarried partners as well, reflect two ideas of this kind.

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18. Indeed, a robust pluralism of affiliative structures would also allow for *non-affiliation*, and would rethink fundamentally the linkage of important rights and benefits like health insurance coverage with long-term interpersonal commitment. *See* Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 6 OUT/LOOK: NAT'L LESBIAN & GAY Q. 9, 16–17 (1989).

19. This point is explored at greater length in Schacter, *supra* note 12, at 719–23.

## III. INTERSEXIONAL EFFECTS OF CONTEMPORARY SAME-SEX MARRIAGE ADVOCACY

We can extend this kind of analysis to an issue suggested, though not addressed, in the panel articles—same-sex marriage advocacy. Professor Sterett's historical analysis of early welfare state programs, and the conceptions of gender and sexuality embedded within them, invites us to think about similar issues in the context of the contemporary welfare state.[20] One way to conceptualize this inquiry would be to ask a question parallel to Sterett's historical question: How do the legal structures that today define and govern welfare benefits participate in constructing gender and sexuality?[21] Although I will touch on that question, I want to take a somewhat different perspective here, one that is consistent with my theme of considering the intersexional effects of particular strategies and legal interventions.

I will focus on contemporary advocacy for same-sex marriage rights and explore some of the possible intersexional effects of that advocacy on issues relating specifically to poor women in the welfare state today.[22] In doing so, I suggest that there are some highly problematic intersexional dimensions here, ones that should influence the course of future advocacy. I do not, in doing so, seek to join here the larger debate among proponents of gay equality about the wisdom of seeking same-sex marriage rights. That debate has been ably engaged by, among others, Bill Eskridge,[23] Paula Ettlebrick,[24] Nan Hunter,[25] Darren Hutchinson,[26] Nancy

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20. *See* Sterett, *supra* note 1.

21. *See generally* Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274. Fineman argues that the welfare system, with its goal of eliminating single motherhood, favors, and pushes individuals into, a traditional nuclear family structure, with the father as financial provider and mother as homemaker. *Id.* at 277–93; *see id.* at 276 ("[T]he ideology of patriarchy is the most instrumental force in the creation and acceptance of discourses about Mothers in our society.").

22. *Cf.* Ertman, *Reconstructing Marriage*, *supra* note 2, at 1248 (recognizing the potential of PSA's to "exacerbate rather than alleviate the marginalization of poor people and many women of color").

23. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 84–85 (1996) (arguing that claims made by gay "marriage critics are too speculative to overcome the presumption of equality").

24. Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 114 (1996) (arguing that gay and lesbian rights advocates should be cautious in arguing for same-sex marriage and should pursue "more inclusive social and legal policies that would bestow respect and benefits upon all who assume the responsibility and functions of family-whether they are married or not"); *see also* Ettelbrick, *supra* note 18.

25. Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 12 (1991) (arguing that "legalization of lesbian and gay marriage and the adoption of domestic partnership provisions are incomplete unless the other option also exists, and that they need to be analyzed as part of the feminist inquiry into how both private and public law reinforce power imbalance in family life").

26. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 586–602 (1996) (arguing that many same-sex marriage advocates essentialize the gay/lesbian experience, ignoring vital racial and class differences among members of the gay and lesbian community).

Polikoff,[27] Tom Stoddard,[28] and Andrew Sullivan.[29] My focus will be much more targeted.

It will break no new ground to recognize that it has been a consistent strategy of so-called "welfare reformers" to brutally stigmatize single mothers—that subgroup of mothers who, as Martha Fineman has pointed out, must be marked as "single" to separate them from unmodified "mothers," who by definition are to be taken as married.[30] In contemporary political discourse, it passes without much controversy to blame single mothers, especially poor ones, for a wide array of social ills, including, most ironically, poverty itself. Indeed, as Fineman's work has shown, single mothers are routinely identified as both the cause and the result of poverty, and inhabit a category that is itself imbued with a strong dose of moral blame.[31]

Although this long-running rhetorical strategy has powerfully shaped contemporary discourse, the phenomenon is hardly limited to rhetoric. Increasingly, the pressure for single mothers to marry is finding its way into the law. Consider, for example, state experiments with so-called "bridefare," which create financial incentives to marry.[32] Moreover, the 1996 federal welfare reform bill, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,[33] enshrines this view of single mothers both in its legislative findings and within the law itself. Con-

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27. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1549–50 (1993) (arguing that advocacy of lesbian and gay marriage will "require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people").

28. Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, 6 OUT/LOOK: NAT'L LESBIAN & GAY Q. 9, 9 (1989) (arguing that, despite the historically oppressive structures of the marriage construct, gay rights advocates should seek legal recognition of same-sex marriages because the economic advantages and legal rights that marriage confers upon individuals will futher both equal rights and the transformation of the current institution of marriage).

29. ANDREW SULLIVAN, VIRTUALLY NORMAL 178–79 (1995) ("Marriage is not simply a private contract; it is a social and public cognition of a private commitment. As such, it is the highest public recognition of personal integrity. Denying it to homosexuals is the must public affront possible to their public equality.").

30. Fineman, *supra* note 21, at 291.

31. MARTHA ALBERSTON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 106–18 (1995). *See generally* Linda J. Lacey, *As American As Parenthood and Apple Pie: Neutered Mothers, Breadwinning Fathers, and Welfare Rhetoric*, 82 CORNELL L. REV. 79, 79 & n.1 (1996) (reviewing FINEMAN, *supra*, and DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995)) ("Rhetoric about the dangers that single mothers pose to society has reached a fever pitch in the last decade. Critics blame single mothers for poverty, crime, drug addiction, and the breakdown of western culture as we know it.").

32. *See* N.J. STAT. ANN. §§ 44:10-3.4 to 3.7 (West 1993) (repealed 1997) (providing that children whose parents marry shall have their benefits continued); *see also* Julie Kosterlitz, *The Marriage Penalty*, 24 NAT'L J. 1454, 1455–56 (1992) (discussing a similar proposal in Wisconsin).

33. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S.C.).

sider, for example, these legislative findings that appear in the congressional preamble to the welfare reform law:

> "Marriage is the foundation of a successful society."
>
> "Marriage is an essential institution of a successful society which promotes the interests of children."
>
> "The negative consequences of an out-of-wedlock birth on the mother, the child, the family, and society are well documented . . . ."
>
> "The negative consequences of raising children in single-parent homes are well documented . . . ."[34]

Beyond making these specific findings, Congress in 1996 enacted a block grant system, affording states considerable latitude in creating their own welfare systems, but requiring that federal funds be used in ways that further the stated purposes of the law—including, as set forth in the statute, to "encourage the formation and maintenance of two-parent families."[35]

At the very time that welfare reformers unrelentingly hammer poor women for not marrying, and at the very time that marriage is so aggressively pressed in law and in political rhetoric as a panacea for poverty and a magical route to deliverance for poor women, the debate over same-sex marriage rages. I number myself firmly among those who wish that the same-sex marriage debate had not been joined at this particular moment in history—a moment when the forces of so-called family values wield considerable power, as the passage of the Defense of Marriage Act[36] and its many state law analogues[37] painfully reflect. In my view, however, once the same-sex marriage debate *was* joined, advocates of sexual equality were left with little choice but to oppose current marriage law, which imposes a formal, legal inequality on lesbians and gay men. Even still, advocates and academics *do* have crucial choices to make about what strategies and theories to pursue in advocacy.

I am particularly concerned with strategies that valorize and romanticize marriage, as my earlier discussion might suggest that I would be. In

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34. These congressional findings are among those made in connection with the Temporary Assistance for Needy Families program. The findings appear in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101, 110 Stat. 2105, 2110 (codified at 42 U.S.C. § 601 note (Supp. II 1996) (Congressional Findings)), *reprinted in* JULIE A. NICE & LOUISE G. TRUBEK, POVERTY LAW: THEORY AND PRACTICE 619–20 (1997).

35. 42 U.S.C. § 601(a)(4) (Supp. II 1996).

36. The Defense of Marriage Act denies federal recognition to same-sex marriages and legislatively authorizes states to deny recognition to same-sex marriages that may be performed in other states. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996), and 28 U.S.C. § 1738C (Supp. II 1996)).

37. State statutory analogues to this federal law generally deny recognition to any same-sex marriage that may be performed in another state. For an overview of the Defense of Marriage Act and cognate state laws, see Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998).

a general sense, I fear that strategies like these will undermine the real pluralism of affiliative structures that I think we should seek.[38] More specifically, I fear that these strategies draw same-sex marriage advocates—unintentionally, to be sure—into the lamentable larger dynamics that sustain contemporary single-mother bashing.[39] Various advocates today argue, for example, that marriage has a uniquely "civilizing" capacity,[40] that marriage marks a uniquely "deep" commitment to society and by the partners to one another,[41] and that marriage should be pursued for the "social recognition" that it brings.[42] These sorts of arguments can fuel—in ways that can be as real as they are unintended—the stigmatization and relentless condemnation of poor single mothers. After all, to characterize marriage as civilizing is to imply the uncivilized character of those outside the institution. To posit marriage as marking a unique form of commitment seems inescapably to devalue other family arrangements. And, to crave the social recognition that marriage brings is to accept at face value that very social recognition, rather than to question and resist its far-reaching effects.

While arguments like these may be shrewd when measured against the near-term goal of winning more popular support for gay marriage rights in the current political climate, they are troubling in light of their pernicious intersexional effects. By validating the conventional wisdom that posits marriage as society's "very foundation," and by pressing the good, socially acceptable behavior of many marriage-aspiring sexual minorities, these strategies become complicitous in the dominant discourse that makes marriage a compulsory part of citizenship, and that penalizes—harshly, as contemporary welfare reform measures suggest—many who are unmarried.

Here again, there is complexity and uncertainty in attempting to measure the intersexional effects of a legal strategy. The problems I point out may be either less or more severe than I have suggested. The problems may be less severe because I am underestimating the intrinsically radical potential of same-sex marriage—whatever advocacy strategy is used—to destabilize gender and convention, and in turn, to transform the

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38. *Cf.* Hutchinson, *supra* note 26, at 583–636 (arguing that pro-marriage strategies deployed by gay rights proponents work to erase and obscure the experiences and needs of gays and lesbians who are poor or of color).

39. By stressing this aspect of the problem, I do not mean to erase other ways in which advocacy for same-sex marriage may create undesirable effects, such as by creating hierarchies within the gay and lesbian community that disfavor those who may choose not to marry. *See* Ettelbrick, *supra* note 18, at 16 ("Ironically, gay marriage, instead of liberating gay sex and sexuality, would further outlaw all gay and lesbian sex which is not performed in a marital context.").

40. ESKRIDGE, *supra* note 23, at 8–13.

41. SULLIVAN, *supra* note 29, at 182.

42. Evan Wolfson, *Same-Sex Marriages: PRO—Two Sides Debate Issue Before Congress and the Courts*, DALLAS MORNING NEWS, June 23, 1996, at 1J.

institution of marriage[43] into something that cannot be so readily used to subordinate poor women. (Perhaps this might explain why the same Congress that passed welfare reform, after all, also passed the Defense of Marriage Act). Or it may be more severe than I think because my focus on particular advocacy strategies may be too marginal. Given the current context, perhaps *any* social demand for entry into the institution of marriage will inevitably serve to buttress the power of the institution itself and so to enable and encourage its reactionary political uses. The details of how the marriage claim is framed may simply be too nuanced and subtle for the crude collective politics of meaning that help to shape public understandings.

True, there are no easy or irrefutable ways to gauge intersexional effects like these. But, again, we ought to ask the intersexional question and craft arguments and strategies with intersexional considerations in mind. In the domain of the marriage struggle, that means disclaiming strategies that valorize marriage and pursuing strategies that are, instead, explicitly rooted in a vision of real pluralism and justice, broadly construed. This means accepting a responsibility to participate self-consciously in constructing and re-constructing heterosexuality and alternative sexualities with careful attention to the broad and diverse range of interests affected by these processes of construction.

43. *See generally* Hunter, *supra* note 25 (arguing that the legalization of gay and lesbian marriage will potentially destabilize the gender-based definition of marriage, and thus have effects beyond the gay and lesbian communities).

# WHAT'S SO SPECIAL ABOUT SPECIAL RIGHTS?

KAREN ENGLE*

## I. INTRODUCTION

In *The Common Law*,[1] Oliver Wendell Holmes put forth what Robert Gordon has considered a "positivist formulation of a legal right":[2]

> Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives any one *special rights* not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him. When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights; meaning, thereby, that the law helps him to constrain his neighbors, or some of them, in a way in which it would not, if all the facts in question were not true of him . . . . There are always two things to be asked: first, what are the facts which make up the group in question; and then, what are the consequences attached by the law to that group. The former generally offers the only difficulties.[3]

In this article, I use Holmes's definition of a special right to frame the debate between gay rights proponents and gay rights opponents over the issue whether gay rights are special rights. I do so by exploring the arguments made on behalf and against the Employment Non-Discrimination Act (ENDA),[4] a federal bill prohibiting discrimination based on sexual orientation, as well as two judicial opinions that consider gay rights to be special rights.[5]

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* Professor of Law, University of Utah. I am grateful to the University of Denver College of Law and the *Denver University Law Review*, especially to Nancy Ehrenreich, Martha Ertman, and Karla Robertson, for hosting and organizing a terrific forum for exchange of ideas. I greatly appreciate comments on the written and oral presentation of this article from participants of the symposium, particularly Patricia Cain, Jane Schacter and Kendall Thomas, as well as from Daniel Greenwood, Morton Horwitz, Duncan Kennedy, Gary Peller, Ileana Porras and Mary Westby. Thanks to Chris Griffin, Barbara McFarlane and Svitlana Tokarenko for their research assistance, and to The University of Iowa College of Law and The University of Utah College of Law for research funds.

1. O. W. HOLMES, JR., THE COMMON LAW (1881).

2. Robert Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 723 (1982).

3. HOLMES, *supra* note 1, at 214 (emphasis added); *see also* Gordon, *supra* note 2, at 723–24 (quoting and addressing this portion of Holmes's *The Common Law*).

4. ENDA was first introduced in 1994 as S. 2288, 103d Cong. (1994) and H.R. 4636, 103d Cong. (1994). It was subsequently introduced in 1996 as S. 2056, 104th Cong. (1996) and H.R. 1863, 104th Cong. (1996) and again in 1997 as S. 869, 105th Cong. (1997).

5. The two opinions are Justice Scalia's dissent in *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) and the majority opinion in *Equality Foundation, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

Through this exploration, I make three arguments. First, opponents and proponents of gay rights use the term "special rights" in very different senses. As a result, ENDA advocates, by arguing that ENDA does not grant homosexuals special rights, are not responsive to the special rights critics. Second, not only do ENDA advocates fail to address their opponents' concerns, they unwittingly buy into a very conservative view about civil rights. That is, they suggest that economic efficiency should guide lawmaking, and that affirmative action or other "preferences" are negative. Third, ENDA advocates perpetuate and even accentuate the assumption made by critics that special rights for gay men and lesbians, as well as for other groups, are bad. I question this assumption by calling for a gay rights advocacy that responds to the critics by arguing *for* special rights, because—in Holmes's sense of the term—the facts call for them.

In many ways, Holmes's two questions highlight the distinctions between the ways that special rights are used by opponents and proponents of gay rights. The first inquiry, "what are the facts which make up the group in question,"[6] is largely focused on by proponents. For them, the group is homosexuals and the argument is that there is nothing special about the facts that require special treatment. If anything, the facts—as they see them—tend to lean toward the opposite result. In Justice Scalia's dissenting opinion in *Romer v. Evans*,[7] for example, homosexuals are defined by the conduct that they engage in, conduct that may constitutionally be criminalized and therefore should not be protected.[8] Gay rights advocates, in contrast, rarely talk about the facts that make up the group. Rather, they tend to focus on the legal consequences attached to the determination of whether the group is protected. Justice Kennedy's failure to mention *Bowers v. Hardwick*[9] in his majority opinion in *Evans*, is, as Janet Halley has discussed, an example of the avoidance of the factual discussion.[10] Further, ENDA advocates seem more concerned with the legal consequences of the bill's passage (no affirmative action, for example) than the discrimination that calls for a remedy.

In this article, I call for gay rights advocates to focus on the first inquiry, by turning to the facts that make up the group "homosexual." The article proceeds as follows. Part II outlines four distinct meanings of special rights deployed by opponents of gay rights. These meanings are gleaned from judicial opinions and legislative debate and testimony surrounding ENDA. Part III examines legislative arguments in support of ENDA to demonstrate that gay rights advocates are largely responding to

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6. HOLMES, *supra* note 1, at 214.

7. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

8. *See Evans*, 517 U.S. at 636.

9. 478 U.S 186 (1986).

10. *See* Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 429–30 (1997). For further discussion of Halley's argument, see *infra* notes 149–53 and accompanying text.

a different notion of special rights than any of the four suggested by gay rights opponents. I contend that gay rights advocates ultimately support a conservative vision of civil rights. In Part IV, I attempt to understand what is guiding liberal avoidance of the factual discussion, and suggest two potential ways that gay rights advocates might respond more directly to the conservative special rights critique. In doing so, I call for gay rights advocates to argue the need for special rights for lesbians and gay men. In particular, I urge the development of and reliance on a thick description of the *special* facts to support a claim for special rights.

## II. SPECIAL RIGHTS: WHAT DO THE CRITICS MEAN?

When, in *Romer v. Evans*,[11] the Supreme Court found "implausible"[12] Colorado's stated defense of Amendment 2[13] that it did "no more than deny homosexuals special rights,"[14] many gay rights advocates applauded the Court for "unequivocally stat[ing]" that "[l]aws which protect people from discrimination . . . provide equal rights, not 'special rights.'"[15] The special rights/equal rights debate that dominated the discourse in campaigns to institute and later to repeal gay rights ordinances for at least two decades[16] seemed to have come to a halt, at least in federal courts with regard to referenda that sought to deny sexual minorities, but no other groups, the opportunity to achieve antidiscrimination protection from state or local governments.

At the same time that *Evans* was decided, the Court voted 6-3 to vacate and remand for reconsideration a Sixth Circuit decision upholding a ballot-initiative-driven amendment to Cincinnati's Charter that read strikingly similarly to Amendment 2.[17] Article XII of the Cincinnati Charter, codifying Issue 3, prohibited the city from granting "special class status . . . based upon sexual orientation, conduct or relationships."[18] Because of the similarities in the two cases and because "every single

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11. 517 U.S. 620 (1996).

12. *Evans*, 517 U.S. at 626.

13. Amendment 2 was codified as COLO. CONST. art. II, § 30(b) (1992) and subsequently declared unconstitutional and permanently enjoined from enforcement in *Evans*.

14. *Evans*, 517 U.S. at 626 (paraphrasing the state's principal defense of Amendment 2).

15. Matt Coles, *ACLU Applauds Supreme Court Decision Striking Down Colorado's Anti-Gay Amendment 2*, ACLU NEWS & EVENTS (May 20, 1996) (last visited Dec. 22, 1998) <http://www.aclu.org/news/ n052096b.html>; *see also* Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 WIS. L. REV. 893, 955; Rudy Serra, *Sexual Orientation and Michigan Law*, 76 MICH. B.J. 948, 949 (1997).

16. For an early expression of the position that gay rights constitute special rights, or at least are not civil rights, see ANITA BRYANT, THE ANITA BRYANT STORY 146 (1977) ("[Dade County's] blundering 'gay' ordinance is no more a civil rights issue than is the arrest of a drunk for disturbing the peace.").

17. *See* Equality Found., Inc. v. City of Cincinnati, 518 U.S. 1001 (1996) (Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer for the majority; Chief Justice Rehnquist and Justices Scalia and Thomas dissenting), *vacating and remanding* 54 F.3d 261 (6th Cir. 1995).

18. CINCINNATI, OHIO, CHARTER art. XII (1993), *quoted in* Equality Found., Inc. v. City of Cincinnati, 128 F.3d 289, 291 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

anti-gay voter initiative of recent years [had] been rejected by courts,"[19] "gay rights groups were shocked"[20] when the Sixth Circuit, upon reconsideration in light of *Evans*, continued to find the Cincinnati Charter Amendment constitutional.[21] That opinion evinces the continued persuasiveness of the special rights argument.

Writing for a unanimous panel of the Sixth Circuit, Judge Krupansky distinguished *Equality Foundation* from *Evans* on several grounds. First, *Equality Foundation* involved a city-wide, not state-wide, action.[22] Consequently, the effects of the Charter Amendment were not as burdensome for homosexuals to overcome as the statewide constitutional amendment that would have been required in Colorado.[23] Moreover, in applying the rational relation test, the court found that, because of the local scope of the Charter Amendment, the voters' rights were more directly implicated than they were in Colorado.[24] Hence, the court found that "the valid interests of the Cincinnati electorate in conserving public and private financial resources is, standing alone, of sufficient weight to justify the City's Charter Amendment under a rational basis analysis."[25] Finally, the court spent a significant amount of time arguing that, while the Colorado amendment potentially excluded lesbians and gay men from the protection of ordinary laws, the Cincinnati Charter was not so broad.[26] Rather, it "eliminated only 'special class status' and 'preferential treatment' for gays as gays under Cincinnati ordinances and policies."[27]

The Sixth Circuit's *Equality Foundation* opinion has already been attacked by a number of legal scholars and gay rights advocates for misreading *Evans*.[28] Only time will tell whether these distinctions will last, although they have been reinforced by the Supreme Court's recent denial of the petition for writ of certiorari in *Equality Foundation*.[29] Although I

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19. David E. Rovella, *Gay Groups Are Angry at Sexual Preference Ruling—Cincinnati Law Contradicts High Court Case, They Say*, NAT'L L.J., Nov. 10, 1997, at A9 (quoting Suzanne B. Goldberg, Lambda Legal Defense and Education Fund).

20. *Id.*

21. *See Equality Found.*, 128 F.3d at 301.

22. *See id.* at 296.

23. *See id.* at 296–97.

24. *See id.* at 300.

25. *Id.* at 301.

26. *See id.* at 299–300.

27. *Id.* at 297.

28. *See, e.g.*, J. Mitchell Armbruster, *Deciding Not to Decide: The Supreme Court's Expanding Use of the G.V.R. Power Continued in* Thomas v. American Home Prod., Inc. *and* Department of the Interior v. South Dakota, 76 N.C. L. REV. 1387, 1416 (1998); Mark Hansen, *Distinguishing 2 from 3, 6th Circuit Panel Stands by Anti-Gay Rights Initiative Despite Supreme Court Quashing of Similar Measure*, 84 A.B.A. J. 35 (1998).

29. Equality Found., Inc. v. City of Cincinnati, 119 S. Ct. 365 (1998) (denying petition for writ of certiorari). Justice Stevens, writing for the Court, expressly noted that the denial "should not be interpreted either as an independent construction of the charter or as an expression of its views about the underlying issues that the parties have debated at length." *Equality Found.*, 119 S. Ct. at 366.

mostly agree with the critics as a matter of doctrine, I will use the *Equality Foundation* opinion in this article, not for its distinctions from *Evans*, but for its blatant acceptance of gay rights as special rights. More importantly, though, the decision reflects a position that all civil rights are special rights. Since *all* antidiscrimination law is seen as special by the court, the primary question seems to be whether special rights are constitutionally required for any given group.

This view of special rights is not new. It can be found in Justice Scalia's dissent in *Evans*[30] and in much of the rhetoric in opposition to gay rights—on the streets, in courts, in testimony before Congress, and among legislators themselves. Jane Schacter[31] and Samuel Marcosson[32] have pointed out that an almost identical critique can be found in legislative opposition to the passage of the 1964 Civil Rights Act.[33] In addition, Schacter has demonstrated that the "rhetoric of 'special rights' . . . is laden with corrosive double messages that are hostile to civil rights law in general."[34]

When gay rights opponents argue that prohibiting discrimination based on sexual orientation gives homosexuals special rights, they generally have one of four connected but distinct positions in mind. These positions fall roughly into two categories already identified by Samuel Marcosson in his study of the history and use of the special rights position in both the contemporary gay rights context and in civil rights debates in the 1960s.[35] That is, they argue either that all civil rights are special rights or that gay rights are special because they grant homosexuals rights that others do not have. Marcosson has done a fine job of documenting these positions but, as I describe below, I do not believe he fully captures their nuances. Moreover, I believe each of these positions must be subdivided.

### A. *Meaning One: Civil Rights Are Special Rights*

Samuel Marcosson spends much of his article addressing the equation of civil rights with special rights. He describes the position as follows:

> [C]ivil rights protections are by their nature "special rights" and . . . sexual orientation is not a valid basis for these rights. This ar-

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30. *See* Romer v. Evans, 517 U.S. 620, 637 (1996) (Scalia, J., dissenting).

31. Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 303–07 (1994).

32. Samuel A. Marcosson, *The "Special Rights" Canard in the Debate over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 144–54 (1995).

33. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); *see also* THE CIVIL RIGHTS ACT OF 1964: OPERATIONS MANUAL ON FAIR EMPLOYMENT PRACTICES, PUBLIC ACCOMODATIONS, FEDERAL ASSISTANCE 17–22 (1964) (providing analysis and legislative history on the Civil Rights Act of 1964).

34. Schacter, *supra* note 31, at 300.

35. *See* Marcosson, *supra* note 32, at 140–44.

> gument is twofold: it argues first that the right to be free from employment discrimination is in some way "special," and second that while it is valid to confer this "special right" on the basis of race, sex, or religion, doing so on the basis of sexual orientation is either unjustified or improper.[36]

Although I agree with Marcosson that this version of the special rights argument assumes that all civil rights protections are special, I disagree with the second part of his description of the argument that gay-rights opponents necessarily assume that civil rights are justified in other areas.

Marcosson derives this second part of his description from his persuasive argument that the contemporary debate about gay rights is a replay of the debate around civil rights in the 1960s, only this time applied to sexual orientation.[37] Perhaps his quotation from Senator Hill's statement in opposition to the proposed Civil Rights Act of 1963 best summarizes the argument: "Under a misleading banner labeled 'equal opportunity,' proponents . . . would have the Congress enact what in fact and substance is 'the Special Privilege Act of 1963.' For rights won at the expense of others' rights are not rights at all, but special privileges . . . ."[38] Of course this position relies on another argument, which is that rights of business owners to run their business as they wish should not be trumped by civil rights legislation. Marcosson then demonstrates that the special rights position was defeated in the 1960s, and concludes that therefore any appeal to such a position is now "discredited."[39] Consequently, for Marcosson, gay rights opponents must be assuming that conferring "special rights"[40] on the basis of other classifications is valid.

In this section, I suggest that the gay rights debate has opened up the possibility for such appeals to become credited, not just with regard to gay rights but to all civil rights. When legislators oppose ENDA, for example, they often argue that creating a new special class will only repeat the sins of the past (with regard to other protections). These opponents often maintain that prohibiting discrimination based on sexual orientation would lead to affirmative action or quotas for homosexuals because employers would be scrutinized to ensure that their workforces are appro-

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36. *Id.* at 140 (footnote omitted). A second meaning, which Marcosson dismisses as nothing more than "sloganeering," is "that only a limited group possesses the rights in question; the right is 'special' because it is a right not enjoyed by other groups—and hence ought not to be conferred." *Id.* at 144; *see infra* Part II.B (discussing the second argument).

37. *See* Marcosson, *supra* note 32, at 144–45.

38. *Id.* at 149 (quoting 110 CONG. REC. 4760 (1964) (statement of Sen. Hill)).

39. *Id.* at 147. *But see id.* at 152 (citing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 3–5, 505 (1992) to note that the special rights/free association argument has not been "completely consigned to the scraphead of yesteryear's intellectual musing and judicial concurrences," but adding that Epstein acknowledges that in making the argument he is "swim[ming] against a powerful tide of social consensus").

40. Note that Marcosson puts the term "special rights" in quotation marks. *See* Marcosson, *supra* note 32, at 137.

priately representative of all sexual orientations. Indeed, the dissent in *Evans*, the majority opinion in *Equality Foundation*, and much of the congressional opposition to ENDA conflate special rights and civil rights. In doing so, they either overtly argue that all civil rights are special and therefore bad, or they avoid the question whether all civil rights are bad because special, but insist that special rights based on sexual orientation cannot be justified.

1. The Overt Argument

The argument that all civil rights are special rights and therefore undesirable is most overtly and clearly made in congressional debates about ENDA. That is, opponents of ENDA portray the legislation as an expansion of what they consider intrusive civil rights laws.

Some legislators use the ENDA debate to express their dissatisfaction with Title VII. A statement by Senator Ashcroft typifies the position. After stating that he believed there ought to be civil rights protection on the basis of race and sex (but not sexual orientation), he immediately belied the statement:

> But I remember a situation when I was Governor of Missouri in which one man operating a laundry fired a black woman from the laundry. She was one of seven black women working in the laundry. She was replaced by a black woman. But she sued alleging that she was fired because she was discriminated against on the basis of both race and sex.
>
> *The truth of the matter is that the establishment of protected classes makes much more difficult the ability of anyone to even use good judgment in hiring and firing because there is always this threat of litigation.*[41]

Taken seriously, this statement suggests that there should be no antidiscrimination law at all.

This backlash against antidiscrimination law can further be seen in arguments against creating what many Senators consider a "new" protected class, or a class with special rights. Perhaps Senator Coverdell from Georgia put it most succinctly: "At a time when we are, as a society, questioning the value and effects of affirmative action programs, we should not be creating a new special category of citizens, a special class of citizens that will be a new basis for a new round of quotas and litigation."[42] In other words, ENDA opponents often point to the problems they see with antidiscrimination law as it currently stands in arguing against adding to the protected classifications. As Senator Hatch stated, ENDA would "open up an entirely new category of preferences and re-

41. 142 CONG. REC. S10,000 (daily ed. Sept. 6, 1996) (statement of Sen. Ashcroft) (emphasis added).

42. *Id.* at S10,004 (statement of Sen. Coverdell).

verse discrimination,"[43] despite specific language in the bill to the contrary. Pointing to the fact that ENDA would be enforced by the EEOC, he continued: "I think it will lead to the same sort of sets of preferences that we see today under Title VII that were said could never happen."[44]

To be fair, these legislators do not explicitly state that all special protections are bad. But they do rely on the negative connotation of the term "special" when they refer generally to special classifications other than sexual orientation. The question they pose is whether we should add to what they consider the disastrous effects of Title VII by passing ENDA. Once again, to be fair, they do not argue that antidiscrimination law is *naturally* or *necessarily* bad. Rather, they contend that, due to the interpretation of the law and the enforcement power of the EEOC, employers have been forced into granting preferences to avoid lawsuits. Of course, they ignore in this latter argument both that courts have interpreted all the classifications to protect majorities and minorities, advantaged and disadvantaged,[45] and that an employer's representative "bottom line" racial, sexual, ethnic or religious composition does not constitute an absolute defense to Title VII claims.[46] They also ignore the extent to which courts have invalidated affirmative action plans. Finally, these legislators do not suggest any way to implement antidiscrimination laws that would not lead to what they consider special protection.

2. The "Neutral" Argument

The second version of the argument agrees with the first version that all civil rights are special rights. Although proponents of this position get rhetorical punch from the negative connotation that special rights has taken on in the civil rights arena, they appear agnostic on the issue whether all special rights are impermissible. Rather, their position is that, regardless of whether special rights are justified in other civil rights contexts, they are not justified with regard to gay rights. The argument nevertheless relies on a slippage between civil rights and special rights.

To explore this position, I focus on two judicial opinions: Justice Scalia's dissenting opinion in *Evans* and Judge Krupansky's majority opinion in *Equality Foundation*. Although the legal issues in these cases are constitutional, not statutory, the same question is addressed as in the ENDA debates: Should sexual orientation be treated similarly to race,

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43. *Id.* at S9992 (statement of Sen. Hatch).

44. *Id.* at S9994.

45. *See, e.g.*, Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976).

46. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 442 (1982) (holding that a racially balanced workforce does not constitute a defense to a disparate impact claim). A bottom line might, however, provide both a defense to a systemic disparate treatment claim and evidence, though not conclusive evidence, of nondiscrimination in an individual disparate treatment claim.

sex, and other "suspect" or "quasi-suspect" classifications? And, if not, is animus against gay men and lesbians sufficient to find that there is no rational basis for the law?

As already mentioned, the majority of the Supreme Court in *Evans* found "implausible" the notion that Colorado's Amendment 2 did no more than prohibit special rights for gay men and lesbians.[47] Justice Scalia, in dissent, vigorously disagreed, reading Amendment 2 as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[48] The heart of Justice Scalia's dissent is two-fold. First, the voters only increased the hurdle for homosexuals to obtain special rights, or preferential treatment.[49] Second, there was a rational basis for the state to prohibit such special protection for homosexuals, since the state could constitutionally prohibit the "conduct that defines the class."[50] I focus here on Justice Scalia's use of the terms "special rights" and "preferential treatment," although, as we shall see, his use of these terms in his first argument is not unrelated to his conduct argument.[51]

Throughout his dissenting opinion, Justice Scalia refers to Amendment 2 as merely precluding special, or preferential, treatment for homosexuals.[52] At one point, he states that "[t]he amendment prohibits special treatment of homosexuals, and nothing more."[53] He uses the term special treatment here to respond to the majority's suggestion that Amendment 2 could be read to deprive homosexuals even of the protection of general laws.[54] Although the majority claims not to rely on that possibility,[55] Jus-

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47. Romer v. Evans, 517 U.S. 620, 626 (1996).

48. *Evans*, 517 U.S. at 636 (Scalia, J., dissenting).

49. *See id.* at 637.

50. *Id.* at 641. Although the majority does not make the point, it seems that Colorado's decision to repeal its sodomy statute could undermine this rational basis claim.

51. For discussion and critique of the conflation of status and conduct, see Dan Danielsen, *Identity Strategies: Representing Pregnancy and Homosexuality*, *in* AFTER IDENTITY: A READER IN LAW AND CULTURE 39, 39–60 (Dan Danielsen & Karen Engle eds., 1995); Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identities*, 36 UCLA L. REV. 915, 966–67 (1989); Halley, *supra* note 10, at 442.

52. *See Evans*, 517 U.S. at 638 ("They may not obtain preferential treatment without amending the state constitution."); *id.* at 642 ("[S]urely it is rational to deny special favor and protection."); *id.* at 652 ("To suggest, for example, that this constitutional amendment springs from nothing more than 'a bare desire . . . to harm a politically unpopular group,' is nothing short of insulting.") (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

53. *Id.* at 638.

54. *See id.* at 629–30.

55. *See id.* at 630. It is arguable, however, that the opinion in fact relies on this possibility. Janet Halley argues that the Court responded to the argument that Amendment 2 would deny gay men and lesbians the protection of general laws by "seem[ing] to reject and then adopt [this] reading of Amendment 2 offered in the Tribe Brief." Halley, *supra* note 10, at 430 (referring to an amicus brief filed by Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland and Kathleen M. Sullivan).

tice Scalia argues that Amendment 2 should not be interpreted that broadly. In doing so, his examples are instructive of what he would view as neutral—or non-preferential—treatment:

> [Amendment 2] would not affect . . . a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would prevent the state or any municipality from making death-benefit payments to the "life partner" of a homosexual when it does not make payments to the long-time roommate of a nonhomosexual employee. Or again, it does not affect the requirement of the State's general insurance laws that customers be afforded coverage without discrimination unrelated to anticipated risk. Thus, homosexuals could not be denied coverage, or charged a greater premium, with respect to auto collision insurance; but neither the State nor any municipality could require that distinctive health insurance risks associated with homosexuality (if there are any) be ignored.[56]

At least one fault with both of these examples, of course, is that they ignore background rules about marriage that affect the ability of same-sex couples, unlike straight couples, to receive insurance benefits for or with their partners.[57]

Later, Justice Scalia uses special treatment slightly differently, arguing that Amendment 2 does not even prohibit giving special treatment to homosexuals. Rather, it only prohibits giving such special treatment to them on the *basis* of their homosexuality.[58] In this discussion, he makes clear what he means by special treatment generally. Homosexuals, he claims, "can be favored for many reasons—for example, because they are senior citizens or members of racial minorities."[59] As Mark Fajer has noted, referring to the same language, Justice Scalia "apparently believes that even anti-discrimination laws focused on race are special protections."[60]

While other critics have identified this slippage in the argument, they have done so in a way that assumes the identification of the slippage *is* the critique. In a recently published article, for example, Joseph Jackson argues that Justice Scalia begs the question by deploying preferential treatment arguments, stating that "Justice Scalia might just as well have asserted that civil rights laws guaranteeing the rights of racial minorities

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56. *Evans*, 517 U.S. at 638.

57. For a more elaborate treatment of the first example, see *infra* note 188 and accompanying text.

58. *See Evans*, 517 U.S. at 644.

59. *Id.*

60. Mark A. Fajer, Bowers v. Hardwick, Romer v. Evans, *and the Meaning of Anti-Discrimination Legislation*, 2 NAT'L J. SEXUAL ORIENTATION L. 208, 210 (1996).

to sit at lunch counters accord them preferential treatment."[61] Jackson then quotes from Justice Harlan's dissenting opinion in *The Civil Rights Cases*—arguing that the legislation in question sought "to secure and protect rights belonging to [blacks] as freemen and citizens; nothing more"[62]—in order to dispense with Scalia's position.[63] It seems to me, though, that Jackson too easily dismisses the argument. Justice Scalia would likely agree that the right to sit at a lunch counter without regard to race is a special right. The question would then be whether the special right is justified. Because of the negative implication that special rights has become imbued with in recent years, critics tend to assume that saying the analysis would apply to race is a sufficient critique. But it is not, both because it does not get to the heart of the distinction that gay rights opponents make between race and sexual orientation, for example, and because it does not acknowledge that the use of special rights rhetoric to refer to civil rights protections that we tend to take for granted might not be merely coincidental. It should come as no surprise that some opponents of gay rights would be looking, as the legislative debate makes clear, for some retrenchment of civil rights.[64]

If Justice Scalia slips into a civil rights-are-special position, Judge Krupansky, writing for the Sixth Circuit panel in *Equality Foundation*, dives in. Indeed, the Sixth Circuit's decision relies on a distinction between Colorado's Amendment 2 and Cincinnati's Article XII. Although the court puts some emphasis on the difference between a statewide and local proscription of the protection of gay rights, the decision rests also on a distinction between denying the protection of "general"[65] laws and prohibiting laws granting special treatment.[66] The court reads the Colorado Amendment as doing the former and the Cincinnati Charter Amendment as doing the latter.[67] In doing so, the court accepts a Scalia-type definition of special rights, but reads the Colorado Amendment as more expansive than Scalia admits.

At first glance, Amendment 2 and Article XII look strikingly similar. Indeed, it was because of their similarities that the Supreme Court remanded *Equality Foundation* in light of *Evans*.[68] Upon remand, however, the court insisted that there are crucial differences by relying on the

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61. Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 466–67 (1997).

62. *Id.* at 467 (quoting *The Civil Rights Cases*, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting)).

63. *Id.* ("In short, antidiscrimination laws seek to compel legal recognition of the right to equal treatment, not to accord preferential treatment to those protected. The special rights rhetoric, and the argument Justice Scalia derives from it, are simply misleading.").

64. *See infra* notes 102–04 and accompanying text.

65. *See* Equality Found., Inc. v. City of Cincinnati, 128 F.3d 289, 296 (6th Cir. 1996), *cert. denied*, 119 S. Ct. 365 (1998).

66. *See Equality Found.*, 128 F.3d at 295–96.

67. *See id.* at 296.

68. *See id.* at 301.

many statements made by the majority in *Evans* about the potentially broad sweep of the Amendment to prohibit homosexuals from receiving the protection of general laws.[69] Even though the majority in *Evans* insisted that such sweep was not necessary for its finding that the Amendment was unconstitutional,[70] and Justice Scalia denied that the Amendment 2 could or should be read so broadly,[71] the Sixth Circuit relied on such an interpretation to distinguish Article XII. Midway through the *Equality Foundation* opinion, the court quotes and "contrasts" the language of both initiatives.[72] In doing so, it bolds certain language to emphasize what it considers to be the difference between the texts. The difference seems to rest primarily in the titles of the provisions. Amendment 2 began with "**No Protected Status** based on Homosexual, Lesbian or Bisexual Orientation,"[73] whereas the Cincinnati Charter provision begins with "***NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS.***"[74] Through this emphasis, the court suggests a distinction, then, between protected and special status. It puts in bold some other language as well. While Amendment 2 prohibited any law that would make homosexuals, lesbians or bisexuals entitled to "claim **any** minority status, quota preferences, **protected status** or **claim of discrimination**,"[75] the Cincinnati Charter Amendment prohibits giving the same group "any claim of minority or protected status, quota preference **or other preferential treatment.**"[76]

Although the court attempts to distinguish the language using boldface, the language is not as distinguishable as the court suggests. Indeed, the language of the Cincinnati Charter itself belies the claim that there is any difference between protected status and special status. By adding the words "or other preferential treatment," the Cincinnati Charter includes "minority or protected status" and "quota preference" as preferential treatment. If "preferential treatment" were only to include quota prefer-

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69. *See id.* at 295 ("The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination . . . .") (quoting *Romer v. Evans*, 517 U.S. 620, 627 (1996))). The Court, again quoting *Evans*, explained that "the amendment imposes a special disability upon [homosexuals] alone." *Id.* (quoting *Evans*, 517 U.S. at 631).

70. *See Evans*, 517 U.S. at 630 ("If [deprivation of protection from general laws] follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, and neither need we.").

71. *Id.* at 636 (Scalia, J., dissenting). The Sixth Circuit acknowledges this point. *See Equality Found.*, 128 F.3d at 296 n.6.

72. *See Equality Found.*, 128 F.3d at 296.

73. *Id.* (quoting COLO. CONST. art II, § 30b (1992) (held unconstitutional and permanently enjoined from enforcement in *Romer v. Evans*, 517 U.S. 620 (1996))) (emphasis added by the court).

74. *Id.* (quoting CINCINNATI, OHIO, CHARTER art. XII (1993)) (emphasis added by the court).

75. *Id.* (quoting COLO. CONST. art II, § 30b) (emphasis added by the court).

76. *Id.* (quoting CINCINNATI, OHIO, CHARTER art. XII) (emphasis added by the court).

ence (and not minority or protected status), there would likely be an "or" before the term "quota preference." Moreover, the court continues by stating that the Cincinnati Charter "merely prevented homosexuals, as homosexuals, from obtaining special privileges and preferences (such as affirmative action preferences or the legally sanctioned power to force employers, landlords, and merchants to transact business with them) from the City."[77] In other words, the court sees preferential treatment, or special class status, in the same way as Justice Scalia; it not only includes affirmative action or quotas, but any nondiscrimination provision based on that status. As such, the only distinction that can be drawn between the bolded language is the inclusion of the "claim of discrimination" term in the Colorado Amendment. That difference seems insufficient to support the court's conclusion that "[i]n stark contrast [to the Cincinnati Charter], Colorado Amendment 2's far broader language could be construed to exclude homosexuals from the protection of every Colorado state law."[78] At bottom, then, it seems the difference can only be pinned on the *Evans* majority's discussion of that potential read of the Amendment, a reading that it explicitly contended was not essential to its holding. There is nothing sufficiently different in the language of the initiatives to support the Sixth Circuit's distinction. If the Cincinnati Charter only prohibited special rights for gays—in the Justice Scalia and Judge Krupansky sense of things—the same would have to be said of the Colorado Amendment.

Another part of the *Equality Foundation* opinion makes the slippage between gay-rights-as-special and civil-rights-as-special even more clear. Working out why the class of homosexuals differs from other classifications that already receive constitutional protection, the court argues that invalidating the Cincinnati Charter Amendment would

> disenfranchise the voters of their most fundamental right . . . to vote to override or preempt any policy or practice . . . to bestow *special rights, protections, and/or privileges upon a group of people who do not comprise a suspect or a quasi-suspect class and hence are not entitled to any special favorable legal status.*[79]

In other words, even nondiscrimination protection given on the basis of a suspect or quasi-suspect classification would be seen by this court as special. Although the court suggests that voters would not be able to override special rights to those groups—at least without a substantial or compelling interest—the rights are nonetheless considered special.

Using the *Evans* dissent and the *Equality Foundation* opinions as exhibits, I would argue that conservatives have for sometime cleverly (if unconsciously) conflated the notions of special rights and equal rights.

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77. *Id.*
78. *Id.*; *see also supra* note 69 and accompanying text.
79. *See Equality Found.*, 128 F.3d at 298 (emphasis added).

The opinions show, as Marcosson,[80] Schacter,[81] Jackson,[82] and Fajer[83] have all argued, that the term "special rights" is often used by gay rights opponents to refer to any antidiscrimination law whatsoever. The term "special rights" is not simply referring to, as we might assume, "unequal" treatment like affirmative action. Rather, any law that provides protection for groups based on any (traditionally protected) classification is seen as special. The only question becomes whether such special protection can be justified. Since special treatment today generally connotes inappropriate treatment, at least in the civil rights context, the assumption might be that it rarely can be justified. Certainly, the congressional backlash against Title VII is suggestive of that view. Federal judges, however, might be even more reluctant than some legislators to state such a view, given the entrenchment of antidiscrimination norms in the law. They take that entrenchment as a given (even while jabbing at it by calling the norms "special"), and then aim to distinguish the classifications upon which such special treatment is based. Their attempt to distinguish the classifications leads to the second meaning of special rights.

### B. *Meaning Two: Special Rights As Rights Not Enjoyed by Other Groups*

For Marcosson, a second meaning of special rights would be that "the right is 'special' because it is a right not enjoyed by other groups—and hence ought not be conferred."[84] Marcosson dismisses this argument, however, as "sloganeering,"[85] and therefore does not address it in much detail. Although I agree with Marcosson that the first meaning is prevalent among opponents of gay rights, I do not believe that it can be so easily separated from this second one. The equation of gay rights and special rights has made for a successful slogan against gay rights, and the argument often posed is that antidiscrimination protection based on sexual orientation gives homosexuals rights that others do not have. The argument is made in one of two ways. The thrust of one argument is that the proscription of discrimination based on sexual orientation grants homosexuals rights based on *conduct*. Those rights are then seen as special: not only are they different from those attached to other protected classifications, but they guarantee gays rights that others (presumably straights) are not guaranteed based on conduct such as political affiliation, dress, and so forth. The second argument is that preventing discrimination based on sexual orientation only protects homosexuals and bisexuals, not heterosexuals.

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80. Marcosson, *supra* note 32, at 158.

81. Schacter, *supra* note 31, at 306–07.

82. Jackson, *supra* note 61, at 465–67.

83. Fajer, *supra* note 60, at 210.

84. Marcosson, *supra* note 32, at 140. For a discussion of Marcosson's main argument, see *supra* Part II.A.

85. Marcosson, *supra* note 32, at 144.

1. The Conduct Argument

The main text of Marcosson's article provides only one example of the meaning of special rights as rights not enjoyed by others. It is an argument based on conduct: "For example, if gay men and lesbians were granted the right to commit murder, that would be a 'special right' in the sense that it is not possessed by heterosexuals."[86] While it seems pretty clear that no gay rights proponents would advocate this position, and that the gay rights laws that opponents sought to repeal in Colorado and Cincinnati did not establish any such rights, the tone and sense of the argument is very present among gay rights opponents. Indeed, in a footnote to the above statement, Marcosson acknowledges that this meaning "explain[s] the Supreme Court's anti-gay decision in *Bowers v. Hardwick* . . . where the Court framed Michael Hardwick's case as if he was claiming a specific right to engage in 'homosexual sodomy,' rather than a general right to privacy common to all Americans."[87] When Marcosson published his article, the Supreme Court had not yet decided *Evans*. By relying on the same understanding of *Hardwick* that Marcosson critiques, however, Justice Scalia's dissent in *Evans* and Judge Krupansky's decision in *Equality Foundation* strongly suggest that, even if nonsensical, the argument has force. Indeed, this special rights critique offers the means for distinguishing gay rights from other civil rights.

Justice Scalia and Judge Krupansky might not be phased by the acknowledgment that they treat all civil rights as special rights precisely because they focus on the extent to which homosexuality differs from already recognized suspect and quasi-suspect classifications. Once all such rights are considered special or preferential, the question becomes why favored treatment is permissible (if not desirable) on the basis of race (or age) but should not be permissible on the basis of (homo)sexuality.[88] In addressing this question, Justice Scalia relies heavily on the Court's decision in *Hardwick* to assert a distinction between classifications based on *status* and those based on *conduct*.[89] Homosexuality falls into the latter category for Scalia, as do polygamy, political party affiliation, adultery, prep school attendance, private club membership, eating habits, sexual harassment, dress habits and sports club preferences. To offer a colorful example of this distinction, Justice Scalia critiques a regulation of the American Association of Law Schools re-

86. *Id.* at 140.

87. *Id.* at 140 n.8 (discussing Bowers v. Hardwick, 478 U.S. 186 (1996)).

88. I use parentheses here when referring to (homo)sexuality to indicate that although sexuality, or sexual orientation, is the proper analogy to race, sex, age, etc., both advocates and opponents of gay rights often use the term homosexuality. This usage suggests that only homosexuals, not heterosexuals, would have claims under any law prohibiting discrimination based on sexual orientation. For further discussion, see *infra* Part II.B.2.

89. *See* Romer v. Evans, 517 U.S. 620, 644 (1996).

quiring member schools to prohibit law firms that discriminate based on sexual orientation from interviewing at their schools, while—Justice Scalia suggests—the same employers are free to "refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs."[90] If it is rational to discriminate against snail-eaters and fur-wearers, the argument goes, it is rational to discriminate against those who engage in homosexual conduct, or roughly (if not exactly) the class of homosexuals. The thrust of Scalia's dissent, then, is that homosexuality is more like snail-eating and fur-wearing than it is like race. Consequently, it should not be afforded the special status of already protected classifications, which are in fact based on status rather than conduct.

In the *Equality Foundation* decision, the Sixth Circuit seems to agree with Justice Scalia's view that conduct defines the class of homosexuals. Since the Sixth Circuit is bound by the majority in *Evans*, the court wisely chooses not to quote from Justice Scalia. But because the majority in *Evans* did not address the question of the relationship between status and conduct,[91] the court is able to repeat its pre-*Evans* (pre-remand) determination, which relied upon other circuit court opinions that conflated homosexual status and conduct.[92] That conflation, the court seems to assume, provides the basis for not treating sexual orientation as a suspect or quasi-suspect classification.[93] In any event, the question the court addresses is whether sexual orientation should be afforded special treatment.[94] Subjecting discrimination based on sexual orientation to "rational review," as did the *Evans* majority,[95] the Sixth Circuit finds a rational basis for the Charter Amendment.[96] The court explains that the

90. *See Evans*, 517 U.S. at 652–53.

91. *See* Halley, *supra* note 10, at 429 (providing an illuminating discussion of the absence of *Hardwick* in Justice Kennedy's majority opinion in *Evans*); *see also infra* notes 149–53 and accompanying text (addressing Halley's discussion of the *Evans* dissent focusing on conduct versus the majority's position aimed exclusively at status).

92. *See* Equality Found., Inc. v. City of Cincinatti, 128 F.3d 289, 293 n.2 (6th Cir. 1997) (citing Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987)).

93. The court uses the *Evans* majority decision to apply the rational relationship test to Amendment 2 without acknowledging that *Evans* did not equate homosexual status and conduct.

94. *See Equality Found.*, 128 F.3d at 300.

95. *See Evans*, 517 U.S. at 621 ("If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

96. *See Equality Found.*, 128 F.3d at 300.

Charter passes constitutional muster because saving enforcement and litigation costs *could* constitute a rational basis for the Cincinnati initiative.[97]

This meaning of special rights, then, is in line with the first meaning discussed—that all civil rights are special rights. It adds bite to the position, though, by arguing that rights for homosexuals provide them with rights that others—fur-wearers and snail-eaters, for example—do not have. That right is the right not to be discriminated against based on one's conduct. Perhaps, in this sense, the right becomes extra special.

2. The Conflation of Sexual Orientation and Homosexuality

Another argument that prohibiting discrimination based on sexual orientation grants homosexuals rights that others do not have suggests a different idea—that such laws would only protect homosexuals (and bisexuals), not heterosexuals.

Throughout the legislative debates and testimony on ENDA, both proponents and opponents of ENDA treat the legislation as though it would protect only the *class*(es) of homosexuals and bisexuals, rather than prohibiting discrimination based on the *classification* of sexual orientation. This focus is not surprising given that the impetus for the bill is discrimination against homosexuals, just as the impetus for Title VII was discrimination against blacks. Given the color- and sex-blind course that antidiscrimination law and Equal Protection analysis have taken,[98] however, it is puzzling that it is rarely mentioned that ENDA would prohibit discrimination based on *any* sexual orientation, or at least heterosexual,

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97. *See id.* In making this finding, the court cites some of the very testimony against ENDA that I discussed in the previous section. *See id.* at 300 n.12 (citing 142 CONG. REC. S9992 (daily ed. Sept. 6, 1996) (statement of Sen. Hatch)); *see also* 142 CONG. REC. S10,004 (daily ed. Sept. 6, 1996) (statement of Sen. Coverdell); *id.* at S9997 (statement of Sen. Nickles); *id.* at S9988–89 (statement of Sen. Kassebaum); *supra* Part II.A.1.

The court in *Equality Foundation* distinguished its facts from *Evans* by stating that voters in Cincinnati, unlike many voters throughout Colorado, would be directly affected by any litigation costs. *Equality Found.*, 128 F.3d at 300–01. Because the *Evans* Court did not even look into costs (and certainly the portion of Amendment 2 that prohibits the state—as opposed to local governments—from preventing discrimination based on sexual orientation could be equally motivated by costs), the Court found that only animus could explain the impetus behind the initiative. *See Evans*, 517 U.S. at 632. It could be argued that the two courts applied "rational review" in very different ways. The Sixth Circuit in *Equality Foundation* held the rational relationship test to mean the "challenged legislation must stand if it rationally furthers any conceivable legitimate government interest." *Equality Found.*, 128 F.3d at 293. The Court in *Evans*, on the other hand, did not consider any conceivable government interest but instead found the specific purposes argued by the state to be implausible: "The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them." *Evans*, 517 U.S. at 635.

98. I have critiqued this direction elsewhere. *See generally* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997) (identifying and critiquing the ideology of neutrality that pervades Title VII jurisprudence, even in the area of religion where some accommodation is anticipated by the statute).

bisexual or homosexual orientation.[99] If homosexuals really constituted a "powerful minority," as Justice Scalia and others have suggested,[100] it seems that heterosexuals might look forward to the protection offered them by ENDA. *Without* ENDA, discrimination based on sexual orientation, including discrimination against straight people, would seem to be perfectly permissible.

Even though ENDA defines sexual orientation to include heterosexuality, such inclusion is rarely, if at all, discussed. It seems clear, though, that the inclusion would protect against the very quotas and other affirmative action that ENDA opponents imagine. Again, Title VII provides good precedent. Early on in the interpretation of Title VII, the Supreme Court made clear that Title VII's proscription on discrimination because of race prohibited discrimination against whites as well as blacks.[101] That analysis would almost certainly be applied to ENDA, even if sexual orientation were not specifically defined to include heterosexuality. But by including heterosexual orientation in the definition, the ENDA authors seem to have taken no chances.

Specific statutory language notwithstanding, some ENDA opponents view ENDA as guaranteeing rights to homosexuals but not heterosexuals. Senator Ashcroft from Missouri most overtly depicted this stance during the Senate debates when he stated: "We should be wary of telling young people that . . . you can sue someone for failing to hire you if you can allege that you are a homosexual—you will not be able to do that, if you have ordinary sexual orientation."[102] Others have made the argument more subtly, by suggesting that ENDA would create a new protected class (homosexuality) rather than a new protected classification (sexual orientation).[103] Senator Nickles voiced this argument, even after quoting the bill's definition of sexual orientation and discussing other protected classifications:

> We state under the Civil Rights Act there should be no discrimination on account of gender, on account of race, on account of your ethnic

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99. *See* Employment Non-Discrimination Act, S. 2056, 104th Cong. § 3(11) (1996) ("The term sexual orientation means homosexuality, bisexuality or heterosexuality, whether the orientation is real or perceived.").

100. *See, e.g., Evans*, 517 U.S. at 636 (Scalia, J., dissenting); *Employment Non-Discrimination Act, 1996: Hearing on H.R. 1863 Before the Subcomm. on Small Business*, 104th Cong. (1996) (statement of Robert H. Knight, Daniel S. Garcia, Paul T. Mero) (not included in CIS microfiche compilation of the hearing; available at <http://web.lexis-nexis.com/congcomp>) ("Homosexuals display political power far beyond their numbers.").

101. *See* McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 280 (1976) ("This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' and create an 'obligation not to discriminate against whites.'") (quoting 110 CONG. REC. 2579 (1964) (remarks of Rep. Celler))).

102. 142 CONG. REC. S10,000 (daily ed. Sept 6, 1996) (statement of Sen. Ashcroft). I assume, for lack of a better guess, that "ordinary sexual orientation" refers to heterosexuality.

103. *Id.* at S9997 (statement of Sen. Nickles).

> background, or disabilities or age or religion, and now if this amendment becomes law, we would add sexual orientation, and "sexual orientation" would be defined as homosexuality and bisexuality and heterosexuality. *It actually would elevate homosexuality and bisexuality as a protected class under the Civil Rights Act.*[104]

If ENDA would "elevate" homosexuality and bisexuality as protected classes, however, it would also elevate heterosexuality to such a status. Perhaps this effect is ignored because it is seen as insignificant. The reality is that few people are discriminated against because of their heterosexuality. Yet, if there is genuine concern that ENDA would put pressure on employers to give preferences to homosexuals over heterosexuals in hiring, it seems that ENDA's inclusion of heterosexuality in its definition of sexual orientation would argue against such a result.

This view of laws (or proposed laws) prohibiting discrimination based on sexual orientation as granting rights to non-heterosexuals can be seen in the wording of Colorado's Amendment 2 as well. Although the Amendment was meant to repeal, among other things, laws in Boulder,[105] Aspen,[106] and Denver[107] that prohibited discrimination based on sexual orientation,[108] the Amendment prohibited the enactment of any laws, regulations or policies "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."[109] Indeed, recall that the title of the Amendment reads: "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation."[110] Presumably, under Amendment 2, then, protected status based on heterosexual orientation would have been permissible. In this sense, only one part of the ordinances would have actually been repealed. Heterosexuals would presumably have continued to have claims available under the ordinances.[111] And although the heading of the Cincinnati Charter reads that "NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS," the main text of the Article only prohibits provisions giving that status to "homosexual, lesbian, or bisexual orienta-

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104. *Id.* (emphasis added).

105. *E.g.*, BOULDER, COLO., REV. MUNICIPAL CODE §§ 12-1-1 to 12-1-11 (1987).

106. *E.g.*, ASPEN, COLO., MUNICIPAL CODE § 13-98 (1977).

107. *E.g.*, DENVER, COLO., REV. MUNICIPAL CODE, art. IV, §§ 28-91 to 28-116 (1991).

108. *See Evans*, 517 U.S. at 623–24.

109. COLO. CONST. art. II, § 30b (1992) (found unconstitutional and permanently enjoined in *Evans*, 517 U.S. at 635–36).

110. *Id.*

111. This argument was made by opponents of Amendment 2, but seemed ignored by its proponents. *See* Brief for Respondents at 9–10 n.11, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039).

tion, status, conduct, or relationship."[112] Thus, there is at least a plausible argument that the Cincinnati Charter permits special class status based on heterosexuality.

Perhaps the drafters of Amendment 2 in Colorado and Article XII in Cincinnati did not understand that, in the absence of the laws they opposed, discrimination based on sexual orientation—including quotas for gays—would be absolutely permissible. They were either unbelievably clever and sneaky in their wording of the initiatives, or it never occurred to them that discrimination against heterosexuals would be legal (in the absence of legislation that they saw as providing the basis for such discrimination). In this way, they used special rights to refer to rights that they imagined only homosexuals and bisexuals, not heterosexuals, were receiving. Again, although it might not have occurred to them that discrimination against heterosexuals was legal because there is little evidence of such discrimination, the same could be said of the lack of fear of discrimination against whites or men prior to Title VII. Although those fears primarily arose as a result of the legislation, the judiciary has made it clear that the statute applies to whites as well as blacks, men as well as women.

These four positions on special rights, then, are all related and are made or at least hinted at by most of the opponents of ENDA or of gay rights more generally. Gay rights opponents have successfully managed to imbue special rights with negative meaning, even if the slippage in their arguments suggests that at least some civil rights, though special, might also be palatable.

There is an amazing dissonance between the arguments that gay rights opponents make and the responses that proponents give. As the next Part shows, ENDA proponents respond to yet another meaning of special rights, one rarely if ever put forward by opponents. Moreover, unlike ENDA opponents, proponents seldom, if ever, suggest that special rights might sometimes be justified. Instead, they simply deny that ENDA would grant special rights.

## III. SPECIAL RIGHTS: WHAT DO GAY RIGHTS ADVOCATES MEAN?

The Employment Non-Discrimination Act was first introduced in the Senate in 1994.[113] Ironically, its best chance of passage came in 1996 when some legislators attempted to add it as an amendment to the Defense of Marriage Act ("DOMA").[114] These legislators argued that, even

112. CINCINNATI, OHIO, CHARTER art. XII (1993).

113. S. 2288, 103d Cong. (1994).

114. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); *see* Eric Schmitt, *Senate Weighs Bill on Gay Rights on the Job*, N.Y. TIMES, Sept 7, 1996, at A1 ("Proponents of the bill originally intended to offer it as an amendment to a measure barring federal recognition of same-

if gay men and lesbians should not be entitled to marry, they should not be discriminated against in employment. Although in the end, as a result of a compromise, ENDA was offered as a free standing bill shortly after the passage of DOMA,[115] it failed in the Senate by one vote and never made it to the House.

Aside from the Senate floor debate in 1996, a number of hearings have been held on ENDA. The Senate Labor Committee held hearings in July 1994[116] and October 1997,[117] and the House Small Business Government Programs considered the bill in July 1996.[118] Although testimony against the bill was presented in 1994[119] and 1996,[120] there was no voiced opposition to it in October 1997. In fact, Senator Jeffords, one of the bill's co-sponsors, opened the 1997 Labor Committee hearings by claiming that, although he "expected that [he] would have witnesses yearning to testify in opposition to the bill[,] . . . [his] staff scoured the country for witnesses with differing opinions, to no avail."[121] Senator Jeffords attributed this lack of opposition testimony to changes made to the bill in response to criticisms of previous versions.[122] Indeed, the bill has changed in appreciable ways since 1994, all of which have been noted in subsequent testimony.[123] Those changes seem largely to have been an attempt to respond to the "special rights" critics.

In this Part, I study gay rights advocacy by examining congressional testimony and debate in support of ENDA.[124] I use the debate over ENDA as a laboratory for dissecting the responses that gay rights advocates have given to what they imagine to be the special rights critique(s).

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sex marriages. But Sen. Trent Lott of Mississippi, the majority leader, promised to use a procedural maneuver to keep the Democrats from amending the marriage bill.").

115. Pub. L. No. 104-109, 110 Stat. 2419 (1996).

116. *Employment Non-Discrimination Act, 1994: Hearing on S. 2238 Before the Comm. on Labor and Human Resources*, 103d Cong. (1994) [hereinafter *ENDA 1994 Hearing*].

117. *Employment Non-Discrimination Act, 1997: Hearing on S. 869 Before the Senate Comm. on Labor and Human Resources*, 105th Cong. (1997) [hereinafter *ENDA 1997 Hearing*]. Coincidentally, these hearings were on October 23, 1997, the same day the *Equality Foundation* opinion was handed down.

118. *Employment Non-Discrimination Act, 1996: Hearing on H.R. 1863 Before the Subcomm. on Small Business*, 104th Cong. (1996) [hereinafter *ENDA 1996 Hearing*].

119. *See ENDA 1994 Hearing*, *supra* note 116, at 90 (statement of Robert H. Knight); *id.* (statement of Joseph E. Broadus, George Mason School of Law) (not included in CIS microfiche compilation of the hearing; available at <http://web.lexis-nexis.com/congcomp>).

120. *See ENDA 1996 Hearing*, *supra* note 118 (statement of Robert H. Knight, Daniel S. Garcia, Paul T. Mero) (not included in CIS microfiche compilation of the hearing; available at <http://web.lexis-nexis.com/congcomp>); *id* (statement of Joseph E. Broadus, Family Research Council) (not included in CIS microfiche compilation of the hearing; available at <http://web.lexis-nexis.com/congcomp>).

121. *ENDA 1997 Hearing*, *supra* note 117, at 2 (statement of Sen. Jeffords, Committee Chairperson).

122. *See id.*

123. *See, e.g., id.* (detailing the changes made to ENDA since 1994).

124. This study is primarily based on the 1996 and 1997 testimony.

This study reveals that ENDA proponents in fact spend a significant amount of time responding to the argument that gay rights are special rights. In doing so, they nearly always treat special rights as a negative term; they continually claim that they support equal rights, not special rights. In this sense, they parrot many gay rights opponents. (The group that organized the Cincinnati Initiative called itself "Equal Rights Not Special Rights.") Most striking about these arguments, however, is that they seem to be responding to a meaning of special rights that is rarely put forth, at least overtly, by gay rights opponents. That is, they tend to see the special rights critique as suggesting that gay rights advocates are seeking what is often called "preferential," rather than equal treatment. They defend ENDA in part, for example, by insisting that it would not grant or permit quotas or affirmative action for gay men and lesbians.

The special rights critique to which ENDA proponents respond, then, should be familiar to those who follow affirmative action debates. There, one argument against affirmative action is that it treats individuals differently based on race or some other prohibited classification by granting "preferences" to one or more groups. In that argument, preferential treatment and special rights are treated as synonymous, much the way they are by gay rights opponents. In the affirmative action debate, however, the critique is that individuals both majority and minority should be free from discrimination because of a particular classification. In contrast, the special rights critique poised at ENDA and other attempts at securing gay rights argues against the classification being protected at all. Of course, as the legislative debates discussed in Part II indicate, gay rights opponents do sometimes see affirmative action as an inevitable result of any antidiscrimination law. Even that critique, however, is rarely addressed by ENDA advocates.

Perhaps the defense of ENDA that it does not grant preferences is not as unresponsive as it might at first seem. As Jane Schacter has aptly shown, the term "special rights," when used by gay rights opponents, "deliberately elid[es three] distinct legal concepts—antidiscrimination provisions, affirmative action, and quotas."[125] Through the deployment of what Schacter names a "discourse of equivalents,"[126] she argues, opponents of gay rights "create and reinforce antipathy to gay men and lesbians, in particular, and to civil rights law more generally."[127] Schacter persuasively challenges gay rights advocates to move beyond this discourse by "contesting its potent, if concealed, attack on the legitimacy of all civil rights law."[128] Unfortunately, I argue, ENDA advocates have not responded to that challenge. Rather than contest the elision of the concepts, they have accepted and perpetuated it.

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125. Schacter, *supra* note 31, at 302.
126. *Id.* at 285.
127. *Id.* at 317.
128. *Id.*

This Part will focus on the two most frequent arguments on behalf of ENDA—that it is economically efficient and that it does not guarantee special rights. These two principal advocacy positions, I contend, implicate much more than a debate about gay rights. Just as the special rights critique suggests a retrenchment in civil rights law generally, ENDA advocacy signals a victory for anti-affirmative action forces. Put more strongly, the party line supporting ENDA is a conservative one. It suggests that economic efficiency should provide significant guidance in the determination of whose rights should be protected and that affirmative action and quotas are negative and are unrelated to "equality." Although my primary target here is the second argument, I begin with a few comments about the first.

### A. *Argument One: ENDA Is Economically Efficient*

In testifying on behalf of ENDA, representatives of several Fortune 500 Companies, as well as legislators, have continually pointed out that the bill is good for business. That is, employment discrimination against lesbians, gay men and bisexuals is inefficient because it keeps otherwise capable workers out of the workplace. It seems odd that corporations prohibiting discrimination based on sexual orientation would tip their hand by giving away a secret to their economic success. To the extent that nondiscrimination gives them an edge, one would think that a corporation would exploit that competitive advantage in the marketplace. Corporations that blindly follow their irrational homophobia would lose out. And, if some economists were believed, discrimination would disappear as a result.

So why would private companies encourage Congress to mandate good (efficient) business practice? The argument has obvious rhetorical power. It displaces the "moral" issues[129] and responds to the concern that ENDA might improperly infringe upon employer rights. When looking closely at the ways the argument is articulated, however, a xenophobic hue appears. Economic efficiency is not merely important for individual businesses in the United States; it is important for the United States as a whole because American businesses compete in the global market. As Raymond Smith, Chair and CEO of Bell Atlantic stated: "No company can afford to waste the talents and contributions of valuable employees as we compete in a global marketplace. It is good business, and it is good citizenship."[130] His use of the term citizenship is peculiar here. Is he suggesting that to be a good American, one should not discriminate against other Americans? That argument is familiar, suggesting that we should

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129. *But see* Chai R. Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (encouraging gay rights advocates to begin to address—rather than avoid—issues of morality).

130. *ENDA 1997 Hearing*, *supra* note 117, at 11 (statement of Raymond W. Smith, Chairman and CEO, Bell Atlantic Corp.).

set aside our internal differences in order to conquer as a whole. Representative Torkildsen made a similar statement in opening his Government Programs Subcommittee's hearing on ENDA: "[T]he long-term impact of discrimination has the potential of impeding our nation's progress in the 21st century global marketplace."[131] And for Senator Kennedy:

> Job discrimination is not only un-American—it is counterproductive. It excludes qualified individuals, lowers workplace productivity, and hurts us all. For the nation to compete effectively in a global economy, we have to use all our available talent, and create a work environment where everyone can excel.
>
> This view is shared by leaders in both labor and management, who understand that ending discrimination based on sexual orientation is good for workers, good for business, good for the economy, and good for the country.[132]

The fact that many large corporations support ENDA (and have their own nondiscrimination policies) makes for a palatable argument in Congress. What is never suggested, though, is that nondiscrimination might only be efficient if all businesses are forced to follow it. To the extent that customers can choose between companies that do and do not prohibit discrimination based on sexual orientation (or provide partner benefits), it seems likely that those companies that prohibit discrimination would like to avoid the Disney effect.[133]

### B. *Argument Two: ENDA Does Not Provide Special Rights*

The second primary argument in defense of the bill is more an apology than a point of advocacy. Almost everyone who has testified on behalf of ENDA has pointed out that its scope is very limited and that it does not provide special rights.[134] When proponents argue that ENDA does not guarantee special rights, however, they seem to have a different

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131. *ENDA 1996 Hearing*, *supra* note 118, at 2 (statement of Rep. Torkildsen, Subcommittee Chairperson).

132. *ENDA 1994 Hearing*, *supra* note 116, at 2 (statement of Sen. Edward M. Kennedy); *see also ENDA 1996 Hearing*, *supra* note 118, at 65, 66 (statement of Mike Morley, Eastman Kodak Co.) ("Our competitive position will clearly be strengthened by increasing understanding of the value of people's diverse opinions, on a global basis . . . . A truly diverse global workforce will be our greatest strength in a fiercely competitive marketplace.").

133. The Walt Disney Company adopted a domestic partnership policy, leading the Southern Baptist Convention to stage a boycott against Disney in 1997. The 12,000 delegates approved a resolution that called for "every Southern Baptist to take stewardship of their time, money and resources so seriously that they refrain from patronizing The Disney Co. and any of its related entities." Nancy Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337, 345 n.43 (1998).

134. *See, e.g.*, *ENDA 1997 Hearing*, *supra* note 117, at 42 (statement of Chai R. Feldblum); *id.* at 2 (statement of Sen. Jeffords); *id.* at 91 (statement of Christopher E. Anders, ACLU).

idea about the meaning of special rights than those expressed by any of the four positions taken by the opponents of gay rights.

Perhaps proponents' view of special rights can best be seen in their arguments about equal rights. For proponents, equal rights would seem to require that gays, straights, and bisexuals be treated identically with regard to employment. As Chai Feldblum, one of the authors of ENDA explained: "[T]he bill's language (that individuals should not be subjected to 'a different standard or different treatment') was designed to clarify that gay people were seeking the right to the same equal treatment that all other individuals enjoy in the workplace."[135]

If equal rights means identical treatment for ENDA advocates, special rights would seem to signal different, or "preferential," treatment. Affirmative action and quotas would fall into the latter category, as would benefits for domestic partners. President Clinton wrote to the Senate Labor Committee in his letter in *support* of ENDA: "[Y]our bill specifically prohibits preferential treatment on the basis of sexual orientation, including quotas. It also does not require employers to provide special benefits."[136] The President's sentiments are echoed throughout pro-ENDA testimony.

Indeed, it is quite common in the testimony for a statement that ENDA provides equal, not special, rights to be immediately explained by ENDA's prohibition of quotas or affirmative action. As Senator Jeffords explained: "Although ENDA helps create equal rights for job opportunities, it does not create any 'special rights' for gays and lesbians. In fact, this legislation expressly prohibits preferential treatment based on sexual orientation."[137] Another advocate testified: "There is nothing radical or even questionable in this legislation. It is clear, straightforward, and focused like a laser beam on an achievable objective—which is equal treatment in the workplace for everyone. It places no burden on small business, it imposes no costs, and it dictates no quotas."[138] Indeed, advocates alternatively describe the legislation not only as not radical, but as "conservative,"[139] "narrow,"[140] "modest,"[141] and "moderate."[142] When

135. *Id.* at 37 (statement of Chai R. Feldblum) (quoting section 4 of ENDA).

136. Letter to Senator Edward M. Kennedy on Proposed Employment Non-Discrimination Legislation, II PUB. PAPERS, WILLIAM J. CLINTON 1632 (Oct. 19, 1995).

137. *ENDA 1997 Hearing*, *supra* note 117, at 1 (statement of Sen. Jeffords, Committee Chairperson).

138. *ENDA 1996 Hearing*, *supra* note 118, at 77, 78 (statement of Brenda Cole, Board of Directors, Wainright Bank & Trust Co.); *see also id.* at 71 (statement of Elizabeth Birch) ("[ENDA] imposes no costly mandates, dictates no quotas, and specifically prohibits special treatment . . . ."); *ENDA 1997 Hearing*, *supra* note 117, at 42 (statement of Chai R. Feldblum) ("[ENDA] prohibits an employer from adopting a quota based on sexual orientation and from giving preferential treatment to an individual based on the individual's sexual orientation.").

139. *ENDA 1996 Hearing*, *supra* note 118 (statement of Debbie Della Piana, Millipore Corp.) (not included in CIS microfiche compilation of the hearing; available at <http://web.lexis-nexis.com/congcomp>) ("ENDA is clean, simple, conservative legislation which does not establish quotas or impose additional costs.").

Senator Jeffords noted that no one wanted to testify against the bill before the Labor Committee, he suggested that the lack of opposition was due to the changes that were made to the bill after the Senate failed to pass it in 1996. Those changes included prohibiting employers from collecting statistics based on sexual orientation, clarifying that affirmative action would be prohibited even as a direct remedial measure in a consent decree, and increasing the exemption for religious organizations.[143]

Even before these changes, advocates insisted that the bill was narrow. In addition to pointing to the above limitations, they also repeatedly reminded opponents that the bill did not require employers to grant domestic partner benefits to gay couples. Although such benefits would appear to make good business sense, given that a significant number of the same Fortune 500 companies that have antidiscrimination clauses based on sexual orientation also include domestic partner benefits, those testifying on behalf of ENDA have used the bill's failure to require domestic partner benefits as support for the proposition that the bill does not guarantee special rights, and is limited.[144] Why domestic partner benefits would be special or inappropriate is never explained; it is simply assumed.[145]

When advocates address the special rights critique, then, they generally do so by emphasizing that the bill does not require, and now does not even permit, affirmative action or quotas. There is a certain irony in this position. As suggested in the previous Part, to the extent that quotas or other "preferential" treatment for homosexuals are seen as discriminatory, they would currently seem to be permissible, as discrimination based on sexual orientation is not prohibited by federal law.[146] Under this reading, ENDA could be seen as protecting heterosexuals from discrimination, particularly if homosexuals are seen as a powerful minority.

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140. 142 CONG. REC. S9995 (daily ed. Sept. 10, 1996) (statement of Senator Kerrey) ("I think the sponsors of this legislation . . . have done a very good job of trying to draft it in a narrow way . . . ."); *ENDA 1996 Hearing*, *supra* note 118, at 69 (statement of Paula Alexander, Eastman Gelatine Corp.) ("[T]he bill also supports business by taking a narrowly tailored approach.").

141. *ENDA 1997 Hearing*, *supra* note 117, at 91 (statement of Christopher E. Anders, ACLU).

142. 142 CONG. REC. S10,131 (daily ed. Sept. 10, 1996) (statement of Sen. Robb) ("[ENDA] is moderate, reasonable, and eminently fair.").

143. *ENDA 1997 Hearing*, *supra* note 117, at 2 (statement of Sen. Jeffords).

144. *See, e.g.*, *ENDA 1996 Hearing*, *supra* note 118, at 128 (statement of Chai R. Feldblum).

145. One individual testifying on behalf of ENDA stated that he favored domestic partner benefits, but that "there are other ways to approach their provision than through legislation." *Id.* at 56 (opening statement of the Hon. Earl Blumenauer). Further evidence cited in support of the proposition that ENDA is narrow is that it does not permit disparate impact claims. Although no one connects domestic partner benefits and disparate impact, it would certainly seem that a company's policy providing benefits for spouses but not domestic partners would be ripe for a disparate impact challenge, were one permitted. Oddly, Chai Feldblum argued that the bill does not cover disparate impact claims because the discrimination to which gay men and lesbians are generally subjected is of the overt type. *See ENDA 1997 Hearing*, *supra* note 117, at 38 (statement of Chai R. Feldblum); *see also ENDA 1996 Hearing*, *supra* note 118, at 56 (opening statement of Hon. Earl Blumenauer).

146. *See supra* Part II.B.2.

The primary point of the above discussion is to show the extent to which ENDA advocates fail to address the special rights critiques posed by opponents. Opponents argue that *all* protections against discrimination are special. But while such protection might (or might not) be justified for race, sex, religion, national origin, disability, or age, they maintain, it is not justified for sexual orientation. What opponents are asking for, then, is such justification. To the extent that proponents provide a justification, they only do so indirectly, with arguments about economic efficiency or good business practice.

## IV. RESPONDING TO THE SPECIAL RIGHTS CRITIQUE

If arguments about economic efficiency and good business practice do not respond to opponents of gay rights, how should gay rights advocates promote or defend the legal reforms they propose?

Liberals and conservatives both seem to share an inability to distinguish sexual orientation from other classifications that are not afforded protection. Recall Justice Scalia's representative list of those unprotected against discrimination by the Association of American Law Schools: Republicans, adulterers, attendees of certain prep schools or members of certain country clubs, snail-eaters, womanizers, fur-wearers, Chicago Cubs-haters.[147] For Justice Scalia, homosexuals should also fall into this group of the unprotected, presumably because of their conduct. That is, Justice Scalia's list tends to focus on conduct. Because he sees sexual conduct as defining the class of homosexuals, he argues that they should be added to the list of the unprotected.[148] By eliding conduct and status in this way, Justice Scalia is able to avoid the question whether special rights are permissible based on what he might consider status classifications, such as race and sex, while challenging liberals to justify protection for those who engage in homosexual conduct.

Janet Halley has shown one way that liberals have avoided Justice Scalia's question. If Justice Scalia's dissent in *Evans* focuses solely on conduct, Justice Kennedy's majority opinion is aimed exclusively at status. Borrowing from different portions of the opinion, Halley explains:

> *Romer* makes a major departure from this dispute [over the relationship between *Hardwick* and Amendment 2], a shift from thick to thin description, from realism to nominalism. It describes and populates the class under consideration in a self-consciously nominal gesture: "the named class, a class we shall refer to as homosexual persons or gays and lesbians." This is "a single named group" defined by "a single trait." "Homosexuals, by state decree, are put in a solitary class": the Amendment "classifies homosexuals to make them unequal to

147. *See supra* note 90 and accompanying text (discussing Romer v. Evans, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting)).

148. For an analysis of other case law that conflates conduct and status but focuses on conduct, see Danielsen, *supra* note 51, at 47–49.

> everyone else"; "It is a classification of persons undertaken for its own sake" and in that sense it is a "status-based enactment": "[C]lass legislation . . . [is] obnoxious . . . ."[149]

Halley argues that the *Evans* majority uses the term status in the historical sense. That is, status does not refer to a type of person, but rather to a type of relationship—"Not kleptomaniac or drug addict but commoner, prince, infant."[150] Halley concludes that "[f]or purposes of the majority's analysis, then, the real content of the class is quite beside the point: if the same discrimination were inflicted on blondes or burglars, the same conclusion would follow."[151]

Halley's analysis highlights the extent to which the *Evans* majority has altogether avoided Justice Scalia's challenge. By demonstrating that, in principle, the majority's analysis would apply to blondes and burglars, Halley shows how the historical sense of status relied on by the majority can encompass contemporary notions of both status (blondes) and conduct (burglars). In doing so, she undermines Justice Scalia's assumption that the reason that homosexuality should not be protected is because it is essentially a category based on conduct. More damaging perhaps, though, she uncovers the inability of the majority to distinguish homosexuality from any other unprotected classification. By "declining to know or say anything about the social representational world of sexual orientation personhoods,"[152] the majority is unresponsive to Justice Scalia's analogy.[153]

Why is the question posed by Justice Scalia so difficult for liberals to respond to? Why are gay rights advocates so reluctant to argue that homosexuals are in need of special rights or even that they are frequent victims of discrimination?

First, as a strategic matter, polls suggest that it would be political suicide to argue that gays should be guaranteed special rights. The public seems more responsive to the suggestion that gays should be given equal rights than that they be given special rights.[154] Yet, the polls beg the

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149. Halley, *supra* note 10, at 439–40 (second and third alterations in original) (footnotes omitted).

150. *Id.* at 440. Of course, the use of status to describe a type of person might well coincide with Justice Scalia's use of conduct. Kleptomaniac and drug addict can refer to conduct in the same way as womanizer or adulterer, although the latter two examples are not as often pathologized as the former.

151. *Id.* at 440–41.

152. *Id.* at 441.

153. For Halley, "this 'speech act of a silence' . . . leav[es] the attribution of status on the basis of conduct and the attribution of conduct on the basis of status to the political sphere whose actions are under judicial review." *Id.* (quoting EVE KOSOFSKY SEDGWICK, EPISTIMOLOGY OF THE CLOSET 3 (1990)).

154. *See* Roderick M. Hills, *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1635 n.70 (1997). When the question is posed as to whether homosexuals should be granted "special

question, since the meaning of equal rights is as contested as that of special rights. Recall that proponents of Amendment 2 in Colorado and Article XII in Cincinnati argued for equal rights (not special rights) for lesbians and gay men. They succeeded in passing referenda to repeal gay rights ordinances with that argument.

Second, liberals seem reluctant to focus on discrimination against gay men and lesbians because they want to avoid what Jane Schacter has called the "misguided search for sameness."[155] For Schacter, conservatives engage in this misguided search by suggesting that "the entry barrier for civil rights protection can be overcome only if the forms and phenomenology of discrimination against gay men and lesbians are the same as for other protected groups."[156] But conservatives are not alone in this search. No doubt one of the reasons that some gay rights advocates disavow that they are seeking affirmative action is to avoid suggesting that sexual orientation should be treated the same as race (or sex), even if in doing so they deny the utility of affirmative action for any group.

How might gay rights advocates respond to the special rights critics without falling into the trap of the search for sameness? How might they respond to Justice Scalia's critique of the American Association of Law Schools? It seems to me that there are two potential responses.

First, gay rights advocates could argue, as they sometimes suggest, that no one should be subject to arbitrary discipline in the workplace. They could join forces with those who argue for changing the background rule from employment-at-will to a background rule that all employment decisions be "for cause."[157] The second option would be to argue that, unlike those mentioned in the rest of Justice Scalia's list of the unprotected, gay men and lesbians are in need of protection because of the many background legal rules that work against them and because of the systemic discrimination they suffer.

The first option responds to Justice Scalia's position in much the way that Janet Halley suggests the majority in *Evans* treated the issue.[158] This option concedes that no meaningful distinction can necessarily be drawn between sexual orientation and other classifications based on con-

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protections," the majority of persons oppose the protections. *Id.* For example, in a Los Angeles Times Poll, 26 percent support such protection while 66 percent oppose such protection. *Id.* (citing LOS ANGELES TIMES POLL (July 29, 1994), *available in* LEXIS, Market Library, RPOLL File). In contrast, between 74 and 83 percent claim to favor equal rights for homosexuals. *Id.*

155. Schacter, *supra* note 31, at 296–300.

156. *Id.* at 296.

157. *See, e.g.*, Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); Paul H. Tobias, *Current Trends in Employment Dismissal Law: The Plaintiff's Perspective*, 67 NEB. L. REV. 178, 181–84 (1988); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

158. *See* Halley, *supra* note 10, at 437–45; *see also supra* notes 149–53 and accompanying text).

duct or status, but that no distinction needs to be drawn because all of the classifications are irrelevant for job purposes.[159] Or for the *Evans* majority, *no* group should be made a stranger to the laws. In fact, this position is occasionally suggested in the ENDA debate when advocates argue that *everyone* deserves the right to "earn a livelihood,"[160] although they then fail to address why many (unprotected) groups do not have such a right. This approach would require an overt appeal to eliminate employment-at-will as the background rule. Although I am in favor of changing the background rule of employment-at-will, my concern with the strategy as a means to protect gay men and lesbians from employment discrimination is that it only shifts the terrain, not the substance, of the debate. Indeed, a recent decision by the Salt Lake City Council to repeal its anti-discrimination ordinance highlights the potential dangers of this approach.

In January 1998, the Salt Lake City Council voted to repeal a recently passed ordinance prohibiting discrimination based on race, religion, sex, national origin, age, disability, or sexual orientation.[161] Although the debate centered on the inclusion of the term sexual orientation, City Council members voting for the repeal insisted that they were against any ordinance that listed protected classes because the City should not discriminate against anyone. As the Salt Lake City Attorney explained:

> No one sanctions or approves employment discrimination against any person, but the majority of the Council felt that there are better ways of providing protection against discrimination and possible hostile working environment situations than by dividing employees into "groups" and defining rights based on an employee's sexual orientation.[162]

Drafting up a new ordinance protecting everyone proved to be quite difficult, as the debate then shifted to the issue of what characteristics are related to job performance. In particular, the City Attorney proposed a new "generic" ordinance requiring that employment decisions be "rationally based on job related criteria."[163] The letter he wrote to the Coun-

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159. There might, of course, be some exceptions. Most would probably agree, for example, that the GOP ought to be permitted to hire only Republicans. That is, a decision to reject a Democratic applicant because she was a Democrat would be seen as a decision based on "cause."

160. *See, e.g., ENDA 1996 Hearing, supra* note 118, at 69 (statement of Paula Alexander, Eastman Gelatine Corp.) ("This bill is about one simple thing—and that is that all Americans should be able to earn a livelihood."); 142 CONG. REC. S10,131 (daily ed. Sept. 10, 1996) (statement of Sen. Robb) ("Those of us who support the Employment Non-Discrimination Act have a simple plea—let's end discrimination in the workplace.").

161. *See* Rebecca Walsh, *S.L. Council Repeals Gay-Protection Law*, SALT LAKE TRIB., Jan. 14, 1998, at B1.

162. Letter from Roger F. Cutler, City Attorney, to Salt Lake City Council 2 (March 4, 1998) (letter on file with *Denver University Law Review*).

163. The proposed ordinance stated in pertinant part:

cil in support of the proposal, however, ended with the following telling footnote: "A possible exception would exist for those members of these types of classes where the traits or conduct of the individuals can demonstrably be established as contrary to a bona fide job qualification."[164] Critics of the proposed ordinance, myself included, argued that this footnote left the city free to discriminate against homosexuals by suggesting that sexual orientation could be a job related characteristic.[165] At best, it made protection uncertain.[166]

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> Employment decisions and practices in the Salt Lake City Government's classified career service and civil service are prohibited, if they are not rationally based on job related criteria.
>
> 1. "Job related criteria" includes: (a) personal and professional attributes, such as the abilities, qualifications, experience, character, integrity, inter personal skills, education and training, which a person must have to successfully perform the job held or desired, and meet the prerequisites specified in the appropriate written job description; (b) in disciplinary matters, conduct which: (i) adversely affects job performance: (ii) disrupts the workplace; (iii) undermines the authority of management; (iv) impairs close working relationships essential to the efficiency of the workplace; or (v) otherwise impedes a safe, efficient and effective work environment; and (c) criteria based on business necessity.
>
> 2. Immutable physical or personal characteristics that are irrelevant to successful job performance or business necessity are not "job related" criteria, as that term is used in this section.

SALT LAKE CITY, UTAH, DRAFT ORDINANCE § 2.53.030B. (Mar. 4, 1998). For a discussion of the proposed ordinance, see Rebecca Walsh, *For Now, S.L. Council Holds Its Fire in War Over Words; Council Working on New Discrimination Ordinance*, SALT LAKE TRIB., Apr. 20, 1998, at A1.

164. Cutler, *supra* note 162, at 6 (citing Shahar v. Bowers, 70 F.3d 1218 (11th Cir. 1995), *cert. denied*, 118 U.S. 693 (1997)).

165. *See* Walsh, *supra* note 161.

166. As one Salt Lake attorney put it: "Why make this ordinance seem like something it really is not? Sometimes having the pretext of protection is more dangerous than being honest about having no protection at all and letting everyone know it." *Id.* (quoting Ross Anderson).

On November 17, 1998, after eight months of negotiation spurred by controversy over the proposed ordinance, the City Council finally adopted an ordinance that some members claimed would prohibit discrimination based on sexual orientation. In its definition of characteristics on which employment decisions could not be based, it included: "The status of having a lifestyle which is irrelevant to successful job performance; and the status of being in or outside of an adult interpersonal or a family relationship." SALT LAKE CITY, UTAH, ORDINANCE § 2.52.255 (1997). Of course, the first part of the provision is tautological; it says nothing about what type of lifestyle is irrelevant to performance. The second part, though awkward, would seem to offer protection to lesbian and gay employees as well as to many more types of relationships than the council intended (such as polygamous relationships).

The way this ordinance emerged—merely to avoid including the term "sexual orientation" in the ordinance—did not go unnoticed. As council member Deeda Seed, the author of the repealed ordinance prohibiting discrimination based on sexual orientation, noted: "The goal for some of my colleagues clearly was not to say 'sexual orientation.' They didn't. It's not here. If this weren't so painful, it would be hilarious." Rebecca Walsh, *S.L. Council to Vote on Calling Sexual Orientation 'Lifestyle,'* SALT LAKE TRIB., Jan. 16, 1998, at D1 (quoting Council Member Deeda Seed). More importantly, the ordinance is still relatively vague. According to one gay rights advocate:

> In their attempts to avoid at all lengths the use of the words 'sexual orientation,' they are ending up with a very clever ordinance . . . . The problem with vagueness and ambiguity in ordinances is people don't know when they're protected and the people who have to follow the law don't know what to do.

*Id.* (quoting Jon Davidson, Lambda Legal Defense and Education Fund).

The difficulty with the for-cause approach, then, is that it skirts the issue of whether decisions based on sexual orientation can ever be for cause. That violence might be more likely in a workplace with openly gay employees, for example, might lead an employer to concur with the military that being openly gay is incompatible with the job. Of course, it could also lead to the conclusion that homophobia is incompatible with the job. Nevertheless, only the terrain of the debate, not its substance, has shifted.

A more radical deployment of this first option would be to disrupt the employment-at-will assumption by demonstrating that such a background norm gives employers special rights to discriminate. Rather than putting the burden on gay employees to show that it is irrational to discriminate against them, the burden would be on employers to justify their special right to discriminate based on sexual orientation.[167] This would not mean, of course, that employers could never justify their decisions, only that the burden would have shifted. Again, the terrain of the debate would be similar.

The second option, I believe, is more appealing than the first, although the two are not mutually exclusive. This option calls for an unapologetic argument in favor of legal protection for gay men and lesbians because the protection is necessary. It is similar to Schacter's call for increasing visibility.[168] Moreover, it responds to the search for sameness by exposing its underlying fallacy: classifications or groups are not protected because of their inherent similarities. Rather, protected classifications such as sex, race, disability, and religion each have their unique characteristics. Advocates for women, racial and religious minorities, and the disabled have succeeded largely by convincing legislators that the facts called for their protection. Schacter argues:

> What gay men and lesbians share with other groups already protected under civil rights laws is not the reductive social similarity demanded by the discourse of equivalents. The common ground can be found at a higher level of generality: social subordination and stigmatization sub-

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> Michael McConnell has offered a more generous reading of the Council's actions:
> For all its awkwardness the City Council is onto something. Even if we have reservations about the particular wording it adopted last week, the council deserves credit for attempting to find a solution to the gay-rights problem that protects the civil rights of gay citizens without insulting and stigmatizing many other citizens who conscientiously believe—for religious and other reasons—that homosexual conduct is immoral.

Michael W. McConnell, *Salt Lake City Council Deserves Credit for Wrestling with Gay Rights Ordinance*, SALT LAKE TRIB., Nov. 22, 1998, at AA6.

167. This result would be akin to heightened scrutiny for sexual orientation in equal protection analysis.

168. *See* Schacter, *supra* note 31, at 313–17. While Schacter sees visibility as a response to "the gay abstraction," she argues it is deployed by the anti-gay lobby. *Id.* at 313. Janet Halley shows how liberals use this same abstraction to counter the thick description of homosexuality put forth by conservatives, exemplified by the majority opinion in *Hardwick*. *See infra* notes 175–78 and accompanying text.

> ject gay men and lesbians—like other subordinated groups—to systematic exclusion and disadvantage at the hands of dominant groups.[169]

An obvious reason to prohibit discrimination against a group then, would be that such discrimination is widespread, unlike, say, discrimination against fur-wearers and snail-eaters.[170] Surprisingly, though, ENDA advocates do not stress the existence of such systemic discrimination.

While some of those who testify on behalf of ENDA have told the stories of individual victims of discrimination,[171] few have suggested that widespread discrimination against homosexuals is prevalent.[172] Perhaps this justification is not relied upon because to argue that the discrimination were widespread might undermine some of the other arguments in favor of the legislation. If nondiscrimination were rational business policy, for example, the bill's proponents would have a difficult time explaining widespread irrationality. Moreover, the more widespread the problem, the less conservative the bill becomes. Finally, opponents of the bill often suggest that it would lead to extensive litigation.[173] Relying on data from states with state-wide antidiscrimination policies that include protection based on sexual orientation, advocates insist that the bill would do little to increase discrimination claims.[174] They assume that employers have policed themselves as a result of the law, rather than that homosexuals might be less likely to bring such claims to avoid publicly identifying their sexual orientation or that the legislation has been ineffective for other reasons. (Perhaps employees do not know that discrimination based on sexual orientation is illegal in the jurisdiction in which they work.) Moreover, it is not clear to me that the fact that ENDA is likely to increase litigation in any significant way is a persuasive argument for those who would like to see an end to such discrimination; it makes it sound as though the law is unlikely to be enforced.

The second option would require an altogether different strategy with regard to ENDA. Rather than insisting that the legislation is unremarkable, gay rights advocates would address the potentially radical impact of the bill on the legal subjectivity of gay men and lesbians. This position would recognize the extent to which gay men and lesbians suffer

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169. *See* Schacter, *supra* note 31, at 298.

170. *See* Fajer, *supra* note 60, at 210.

171. *See, e.g., ENDA 1996 Hearing*, *supra* note 118, at 79 (statement of Ernest Dillon); *id.* at 83 (statement Todd M. Dobson); *id.* at 157 (statement of Nan Miguel) *id.* at 163 (statement of Michael Proto).

172. For an example of the occasional testimony that does emphasize the extent to which such discrimination is significant, see *id.* at 86 (statement of Michael T. Duffy, Chair Commissioner of the Massachusetts Commission Against Discrimination).

173. *See, e.g., ENDA 1996 Hearing*, *supra* note 118 (statement of Robert H. Knight, Daniel S. Garcia, Paul T. Mero) (not included in CIS microfiche compilation of the hearing; available at <http://web.lexis-nexis.com/congcomp>) ("[ENDA] will entangle businesses [in] all types of expensive litigation."); 142 CONG. REC. S9989 (daily ed. Sept. 6, 1996) (statement of Sen. Kassebaum).

174. *See, e.g.*, 142 CONG. REC. S9995 (daily ed. Sept. 6, 1996) (statement of Sen. Kerrey).

discrimination, and the ways in which the legal system is both directly and indirectly implicated in that oppression.

Janet Halley contrasts the thin description of homosexuality proffered by the *Evans* majority with the thick description set forth by the *Hardwick* majority. She notes, "[t]he claim that 'sodomy' is 'the behavior that defines the class' implies a thick description of the sexual orientation categories, and has precipitated a series of legal struggles to control their description and thus the legal understanding of the real people inhabiting them."[175] While "*Hardwick* frankly acknowledge[s] its textual character by inviting its audience to become engaged in reading it,"[176] the *Evans* majority suppresses "this intense, and tense, relationship between the text and its readers. It invites us to forget ourselves in a way that *Hardwick* does not."[177] It could be said that ENDA advocates follow the same course as the *Evans* majority by refusing to confront the very issues that guide the debate about whether sexual orientation should be a protected classification. Two of these issues described by Halley are sex and hate.[178] Chai Feldblum, in criticism of her own testimony on behalf of ENDA, contends that gay rights advocates have also failed to take on the issue of morality.[179]

Gay rights advocates should seize the opportunity through public debate, whether surrounding ENDA or local law reform projects, to counter the thick description of homosexuality equating it with sodomy and thus moral reprehensibility that conservatives have successfully propagated. A similar attempt at equating heterosexual sodomy and immorality would be laughable, because the majority of the population would identify with the acts being condemned; they would be engaged in the text in a way that they are not in the *Evans* majority or in the defenses of ENDA.

Holmes's definition of a special right[180] provides a firm basis for granting special rights—when special facts are true of one group that are not true of others. Gay rights advocates, then, need to be willing to talk about the facts. What are the special facts of each group—businesses, government, homosexuals, maybe heterosexuals—and what legal consequences should attach to them? To this end, it seems worth arguing that the class of homosexuals, if not created, is maintained by the state, directly through sodomy laws[181] and marriage laws, to take the most obvi-

175. Halley, *supra* note 10, at 439 (quoting Romer v. Evans, 517 U.S. 620, 641 (1996)).

176. *Id.* at 434.

177. *Id.* at 435.

178. *See id.* at 434–37.

179. *See* Feldblum, *supra* note 129, at 299–304.

180. *See supra* text accompanying note 3.

181. *See* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1469–70 (1992); *see also* Bowers v. Hardwick, 478 U.S. 186, 190–94 (1986). For an argument that the government's refusal to prohibit discrimination against gay teachers amounts to a condonation of

ous examples, and indirectly by failing to protect gays against employment, housing, and other types of discrimination.

Violence against lesbians and gay men has been well documented. Studies have shown that gays are among the most frequently targeted groups for hate crimes.[182] One study has found that "slightly more than half of socially active lesbians and gay men . . . experience some form of anti-gay/lesbian violence."[183] Moreover, 89 percent of gay and lesbian respondents have reported being the victims of verbal harassment.[184] Gay men and lesbians also suffer discrimination in the workplace, in terms of wages,[185] working conditions and type of employment.[186] To its credit, the Human Rights Campaign has begun a project to document employment discrimination against gay men and lesbians, with the plan of "expand[ing] our program to uncover more specific examples and to better communicate these stories to lawmakers and their staffs, as well as to the American public through the media."[187]

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violence against gay students, see Anthony E. Varona, *Setting the Record Straight: The Effects of the Employment Non-Discrimination Act of 1997 on the First and Fourteenth Amendment Rights of Gay and Lesbian Public School Teachers*, 6 COMMLAW CONSPECTUS 25, 34 (1998) ("In fact, the shortage of gay and lesbian role models in schools implicitly condones homophobic attitudes and violence against those students who identify themselves, or are identified (whether accurately or not), as lesbian or gay.").

182. *See* Varona, *supra* note 181, at 28 n.19 (citing HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 7 (Gregory M. Herek & Kevin T. Berrill eds., 1992) and U.S. DEP'T OF JUST., FED'L BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 1996 7 tbl.1 (Jan. 8, 1998) (stating that 11.5 percent of the 8,759 bias-motivated incidents reported to the FBI in 1996 were targeted at individuals because of their sexual orientation)). Varona further reports that, according to the Los Angeles County Commission on Human Relations, 27 percent of 783 documented hate crimes in 1993 were aimed at gay men, replacing African Americans as the leading target of those crimes. Varona, *supra* note 181, at 28 n.19 (citing Errol A. Cockfield, Jr., *Crimes of Bias*, L.A. TIMES, Mar. 30, 1995, at B1).

183. GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 37 (1991).

184. *See id.* at 141–44. Verbal harassment for the purposes of the study included threats of violence, epithets, and insults aimed at homosexuals by heterosexuals on account of sexual orientation. *Id.* at 141.

185. *See* M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 728 (1995).

186. For a discussion of discrimination against gay and lesbian lawyers, see Jennifer Durkin, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias by the Legal Profession*, 8 UCLA WOMEN'S L.J. 343 (1998); Executive Summary, *The Los Angeles County Bar Association Report on Sexual Orientation Bias*, 4 S. CAL. REV. L. & WOMEN'S STUD. 297 (1995). For a discussion of discrimination based on sexual orientation in other employment contexts, see Sharon G. Portwood, *Employment Discrimination in the Public Sector Based on Sexual Orientation: Conflicts Between Research Evidence and the Law*, 19 LAW & PSYCHOL. REV. 113 (1995); Thomas Weathers, *Gay Civil Rights: Are Homosexuals Adequately Protected from Discrimination in Housing and Employment?*, 24 PAC. L.J. 541 (1993); Symposium, *Developments in the Law - Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1575 (1989) (stating that homosexuals face discrimination in military employment, employment that requires security clearance, and civil service employment).

187. Human Rights Campaign, *Documenting Discrimination*, (visited Dec. 22, 1998) <http://www.hrc.org/issues/workplac/docdis/index.html>.

Beyond laying out the facts about the lives of gay men and lesbians, gay rights advocates should zero in on the extent to which legal rules outside discrimination and criminal law affect gay men and lesbians. Laws limiting marriage to different-sex couples serve as both a basis and means for discrimination against gay men and lesbians. Regardless of where one comes out on the same-sex marriage issue, the denial of the right to marry to same-sex couples affects the opportunities for those couples.[188] Although this conclusion might seem obvious, it significantly undermines the special rights argument that gay rights grant homosexuals rights not guaranteed to heterosexuals. Justice Scalia makes such an argument.

Recall Justice Scalia's discussion of the scope of Amendment 2: "[I]t would prevent the State or any municipality from making death-benefit payments to the 'life partner' of a homosexual when it does not make payments to the long-time roommate of a nonhomosexual employee."[189] This particular example of the effect of the Amendment is at first blush puzzling. Either Scalia is equating "life partners" with "long-time [nonsexual] roommates," thereby suggesting that there is nothing particularly special about same-sex sexual relationships. Or he is equating life partners of homosexuals and heterosexuals, only without using the term for heterosexuals while putting it in quotations for homosexuals. But equating the two immediately exposes a difficulty in the reasoning. Similarly treating same-sex and different-sex long-term unmarried partners would not, as Justice Scalia suggests, be neutral. The latter have the option of receiving benefits through marriage, while the former do not. The only way that straight and gay couples would be treated equally *vis-à-vis* benefits attached to marital status would be if they both had the legal option to marry. For Scalia, though, requiring that benefits be given to same-sex partners would suggest special treatment. In that sense, marriage is treated specially, and Scalia would have no problems with such special treatment.

In fact, there is a certain irony in the fact that special rights has come to be seen as negative in the context of gay rights. In several other areas, including marriage, special rights are accepted in a matter-of-fact way. It is common in legal discussions about marriage, for example, to state that special rights are incurred from it. According to the *American Jurisprudence*, for example, "[t]he terms 'service,' 'aid,' 'fellowship,' 'companionship,' 'cooperation,' and 'comfort' have also been employed

188. For a list of some of the benefits that come with marriage, see Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, But Not Hell Either*, 73 DENV. U. L. REV. 1107, 1146 (1996). Making marriage increasingly lucrative, Congress has recently decided to amend the existing legislation to relieve married couples of one of the few "penalties" that come with marriage. *See* Jackie Calmes & Jeffrey Taylor, *Tobacco Legislation Is Revived by Compromise Attaching Amendment for Marriage Tax Cut*, WALL ST. J., June 11, 1998, at A24.

189. Romer v. Evans, 517 U.S. 620, 638 (1996) (Scalia, J., dissenting).

in defining those mutual and special rights growing out of the marriage covenant."[190]

The term "special rights" is not necessarily derogatory. In fact, judicial opinions of all stripes have, over the last 150 years, generally treated special rights as rights that the state has chosen to confer upon individuals, groups or itself. The assumption is that those rights are to be enjoyed, without apology. Not only is the Constitution seen to have granted special rights to citizens,[191] other laws are seen to have accorded special rights to corporations,[192] railroads,[193] stockholders,[194] property owners,[195] and parties to treaties[196] to name a few. Of course, there are often competing special rights claims, but my point is that the term is often deployed in a benign way.

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190. 41 AM. JUR. 2D *Husbands & Wives* § 7 (1995); *see also* Lewis v. Storer Communications, 642 F. Supp. 168, 170 (N.D. Ga. 1986) (explaining that liability to a husband's spouse in a suit against a broadcasting company for loss of consortium "is strictly deriv[ed] from the right of the spouse to recover") (citing Smith v. Tri-State Culver Mfg. Co., Inc., 191 S.E.2d 92 (Ga. Ct. App. 1972)).

191. *See Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 79–80 (1872) (outlining some of the special rights of citizenship). Ironically, the first use of the term "special rights" in federal court was in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). There, Chief Justice Taney considered special rights to be positive, and only to belong to certain individuals. *Dred Scott*, 60 U.S. (19 How.) at 412. In particular, blacks did not possess these rights. The court justified this denial of special rights by looking to the original intent of the Framers of the Constitution: "It is obvious that [blacks] were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union." *Id.* at 411–12. If this quotation conveys the meaning of special rights, then special rights are precisely what blacks were (and are) seeking. Understood in this way, when some individuals are denied the privileges, or special rights of citizenship, guaranteeing them those same rights is guaranteeing special rights. In this sense, the Thirteenth and Fourteenth Amendments (among others) can be seen as having given blacks (and others) the special rights that most individuals in the country already enjoy.

192. *See, e.g.*, County of Tipton v. Locomotive Works, 103 U.S. 523, 527 (1880) ("[T]he authority of the legislature to create corporations with special rights and privileges, existed as an incident of sovereignty . . . .").

193. *See, e.g.*, Lucking v. Detroit & C. Navigation Co., 273 F. 577, 582 (E.D. Mich. 1921) ("A railroad company is clothed by the state with special rights, franchises, and privileges, including certain attributes of sovereignty itself . . . .").

194. *See, e.g.*, Johnson v. Fuller, 121 F.2d 618, 625 (3d Cir. 1941) (referring to Pennsylvania corporate law and stating "that a business corporation may amend its charter . . . to increase or diminish its authorized capital stock, or to reclassify the same, by changing the number, par value, designations, preferences, or relative, participating, optional or other special rights of the shares").

195. *See, e.g.*, Schwab v. Smuggler-Union Mining Co., 174 F. 305, 310 (8th Cir. 1909) ("It is hardly necessary to state that any private riparian proprietor upon a stream may obtain, as against other proprietors, special rights to use the water in the nature of easements or servitudes farther and greater than those conferred upon him simply as a riparian proprietor.").

196. *See, e.g.*, Robertson v. General Elec. Co., 32 F.2d 495, 501 (4th Cir. 1929) ("The Attorney General said: 'The treaty under consideration is a reciprocal one: each party to it covenants to grant in the future to the subjects and citizens of the other parties certain special rights in consideration of the granting of like special rights to its subjects or citizens.'") (quoting 19 Op. Att'y Gen. 278 (1889)).

## V. CONCLUSION

This article has intended not only to show that there is little actual connection between the arguments of opponents and proponents of ENDA, but also to suggest that ENDA advocates have, perhaps unwittingly, based their arguments on a very liberal (read conservative) understanding of civil rights. Their arguments seem to take for granted that affirmative action, quotas, or any "preferential treatment" are negative, and that equal rights require identical treatment of all. I have argued elsewhere that this position, particularly regarding race, is and has been the mainstream position for some time.[197] And I am not the first to have made such an argument.[198] If queer (critical) theory has taught us anything, it seems that it has taught us that becoming as mainstream as possible is unlikely to lead to much change in the status quo.[199] More importantly, however, it seems that critical theory generally has taught us that we cannot look at these struggles in a vacuum.[200] When we argue for or against gay rights, we necessarily reflect certain understandings about what we mean by rights, discrimination, equality and justice. And to the extent that we suggest that affirmative action would lead to "special treatment" and be inappropriate for a gay-rights bill, we implicate affirmative action as special. To the extent the term "special" has become a trope for negative and inappropriate action generally, we reinforce that meaning.

In fact, not one person testifying on behalf of ENDA has argued that any rights considered "special" might ever be appropriate. Or that equality might sometimes require different treatment. Historical uses of special rights as well as arguments on behalf of affirmative action or even for prohibiting pregnancy discrimination[201] seem to have been forgotten.

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197. *See* Engle, *supra* note 98, at 327–30.

198. *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 98–130 (1991); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1978) (criticizing the shift from a "victim" to a "perpetrator" perspective in Supreme Court jurisprudence and arguing for a victim perspective that attends to societal and economic subordination); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 802–08 (1990) (describing the Civil Rights-era struggle between Black Nationalism and integrationism and how the latter became the dominant paradigm).

199. *See, e.g.*, Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil Rights Era*, 110 HARV. L. REV. 684 (1997) (reviewing ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995); URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION (1995)).

200. *See generally* AFTER IDENTITY: A READER IN LAW AND CULTURE, *supra* note 51.

201. For discussions of the special treatment/equal treatment debate around pregnancy, see Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1142–63 (1986); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984–1985).

The question gay rights advocates should address is not whether they are advocating for equal rights or special rights, but why gay men and lesbians need special rights. Even in the absence of antigay initiatives, the state makes homosexuals strangers to the laws. Because of these facts, homosexuals are in need of special rights. It's about time we admit it.

# UNPACKING PACKAGE DEALS: SEPARATE SPHERES ARE NOT THE ANSWER

MARY ANNE CASE*

In 1995, Francisco Valdes and I each published lengthy and detailed conceptual analyses of the ways sex, gender, and sexual orientation have been conflated in American law and the ways in which they ought to be disaggregated.[1] Professor Valdes's critique of this conflation in American law was balanced by a chapter in which he favorably compared Native American cultural approaches to InterSEXionality[2] with Euro-American ones. According to Valdes:

> [T]he Native American example not only disproves the Euro-American sex/gender system's sense of essentialism, it also can spark our imagination and expand our horizons as we strive to envision post-conflationary and non-conflationary relations that, ultimately, are more in accord with the self-professed ideals and values of this nation and its laws.[3]

In this article, I take issue with the suggestion that the Native American model Valdes describes is a more desirable, more liberatory alternative, more consistent with the values embodied in American law. I shall focus my attention on two interdependent aspects of the Native American sex/gender system Valdes prefers. The first is a division of the

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1. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995). A third major article on a similar subject appeared at about the same time. *See* Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995). In a sense, Valdes, Franke, and I each centered on a different apex of the triangle formed by sex, gender, and orientation. Valdes, who seeks to break down the conflation between the three as a step toward queer legal theory, takes sexual orientation as his apex. Franke seeks to break down the category of sex and I concentrate on gender. Although each of us concerns him or herself with numerous aspects of what Valdes calls the conflation of sex, gender, and orientation, my focus is the genderbender, Valdes's the homosexual, and Franke's the transsexual.

2. This term is not my own; I take it from the title of the Symposium.

3. Valdes, *supra* note 1, at 210.

world into two roughly equal and separate spheres by gender and the second is the ability of an individual to choose between these spheres, not on the basis of biological sex alone, but on the basis of gendered inclination.[4] In my view such a system would contract, not expand, our present horizons. It would do little more than substitute a package deal centered around gender for the one our culture has conventionally built around sex.

I believe Valdes and I are in substantial agreement as to what would be an attractive sex/gender system: We would each like to see a world in which legal and cultural constraints on an individual's freedom to express gendered traits are minimized. The existing constraints include, not only pressure to conform gender to biological sex, but also a systematic devaluing of traits gendered feminine such that even women are often discouraged from displaying them. Our society has come a long way in allowing individuals within it to mix and match gendered traits as their personal inclination and the tasks at hand may dictate. Although it has not yet come nearly as far in equalizing the values placed on traits viewed as masculine and feminine, further reifying those traits into gendered bundles, into package deals, is not the answer. In my view, a move in the direction of separate spheres, even separate but equal spheres, even when individuals are given a meaningful choice between those spheres unconstrained by biological sex, would be a step back.[5] Moreover, it would be inconsistent with the best principles of American constitutional law.

The Native American system described by Valdes rests on a thoroughgoing division of life and its activities into two separate but equal and opposite gendered spheres. Everything from articles of clothing to occupations and household tasks is assigned to one sphere or the other, although the particularities of assignment may differ from one tribe to another:

> Among the Zuni, for instance, men constructed dwellings, women performed the plastering. Men cultivated the corn, women supervised

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4. These two aspects of the system not only are central to Valdes's analysis, but also have been described by scholars as the "minimal conditions" for the presence of multiple genders in the Native American tradition. *See* Will Roscoe, *How to Become a Berdache*, *in* THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY 371 (Gelbert Herdt ed., 1994).

5. The objections I have to the Native American model are not quibbles about its implementation, but fundamental difficulties with its premises even when well and fully realized. I do not, therefore, propose to contest as an empirical matter whether in any particular Native American culture the spheres assigned to the sexes really were equal or whether crossing into the sphere associated with the other sex was easier for men than for women. A vast anthropological literature already debates the question whether there have ever been societies in which the sexes enjoy equal status. For a review of this literature, see SHERRY B. ORTNER, MAKING GENDER: THE POLITICS AND EROTICS OF CULTURE 139–80 (1996). For purposes of my analysis, I will assume a society along these lines is possible and ask whether it would be desirable.

> the staple's storage and distribution; indeed, men were not allowed access to granaries at all. . . .
>
> . . . [T]hese roles or categories were not constructed to delineate and to enforce dominant/subordinate or active/passive power relations based on sex (or gender): even though "Zuni women and men specialized in separate areas of economic, social, and spiritual life they enjoyed equal prestige and status." Equalized role allocations provided opportunity and status to members of both sexes by dispersing authority over important aspects of society along lines that roughly constituted a sex/gender checks-and-balances system.[6]

Assignment to one sphere or the other was not made strictly on the basis of biological sex, however. Rather, "sex merely created a presumption of gender, rebuttable as each individual discovered her or his actual gender through personal development and through manifestation of individuated social propensities."[7] A crucial part of this sex/gender model is a figure commonly referred to as the berdache, who is a person of one biological sex who gravitates naturally toward the role of the other sex. Typically, a berdache is someone with male genitalia and XY chromosomes who, as an adolescent, gravitates to women's work and behavior patterns and then takes on the female role, including its social status, its habitual activities, its garments and also, as a general matter, its sexual orientation, in that a male berdache usually takes as a sexual partner a traditionally masculine male, with whom he assumes a wifely role.[8]

Traces of something akin to berdache may be found in a variety of American communities.[9] Let me take the risk of suggesting two examples of what I have in mind. First, although I can neither speak as an expert, nor yet back up my claim with the sort of documentation I would like, it

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6. Valdes, *supra* note 1, at 212–13 (footnote omitted) (quoting WILL ROSCOE, THE ZUNI MAN-WOMAN 18 (1991)).

7. *Id.* at 212. A good illustration of the way this presumption worked itself out may be the Greek myth of Achilles's failed attempt at draft-dodging. In order to escape his being sent to a war in which it was predicted he would die, Achilles's mother disguised him in women's clothes and hid him among the women. To catch him out, the Greeks brought gifts to the group of girls among whom Achilles was hiding. While all the others selected beads and trinkets, Achilles alone chose a sword, thereby revealing his masculine gender. In Native American terms, Achilles, by choosing the bow and not the burden strap, has indicated his masculine gender. *See* Harriet Whitehead, *The Bow and the Burden Strap: A New Look at Institutional Homosexuality in Native North America*, *in* SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY 80, 87 (Sherry B. Ortner & Harriet Whitehead eds., 1982).

8. *See* Valdes, *supra* note 1, at 224–25. There is much dispute among historians and other scholars of the Native American sex/gender system about the exact parameters of berdache. Areas of disagreement (and perhaps of tribal variation) include the extent to which a berdache was seen as a "third gender" rather than as someone who had crossed all the way from one gender to the other, whether women had opportunities comparable to men to become berdache, and whether bisexuality and other liminal behavior was an option for berdache. *See id.* at 226, 232–33. For purposes of this article, these disputes, though interesting and relevant, do not need to be resolved.

9. Again, I mean my discussion of berdache-like elements in these communities to be compared primarily with Valdes's ideal of berdache, rather than with the actual practices of berdache in any particular Native American community.

seems that there is something akin to the berdache tradition in the lives of some African American gay men.[10] I have earlier had occasion to note that the majority of legal challenges brought by effeminate men were brought by black men.[11] These include Bennie Smith, who unsuccessfully challenged another black man's refusal to hire him simply on the grounds that Smith was "effeminate;"[12] Anthony Slater, who successfully petitioned to appear at his public high school graduation in women's clothing;[13] Darrell Williamson, who unsuccessfully claimed race discrimination when fired for wearing makeup on the job;[14] and Ernest Dillon who unsuccessfully claimed that the anti-gay harassment he suffered as a postal employee resulted from impermissible sex-stereotyping.[15] In addition, one of the few ultimately successful challenges to the U.S. military policy of excluding homosexuals was brought by Sgt. Perry Watkins, a flamboyantly effeminate black "queen" who was reported to have ingratiated himself with his fellow soldiers, inter alia, by performing as a female impersonator.[16] Might it be that these effeminate black men are occupying a space akin to the berdache, such that exaggerated effeminacy becomes the safest alternative in a culture prone both to impose hypermasculinity as a model for black men and to see such hypermasculinity as a threat? Might it also be that the strong role women have played in African American culture makes the choice between the masculine and feminine spheres a more balanced one for black than for white Americans?[17]

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10. I wish there were a similarly extensive body of sociological and historical scholarship here as there is on the Native American berdache tradition. Unfortunately, in its absence, I have had to rely more than I would have wished to on anecdote and speculation.

11. *See* Case, *supra* note 1, at 50 n.166.

12. Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 329 (5th Cir. 1978).

13. Richard Leiby, *Clothed in Controversy; He's a 16-Year Old Gay Transvestite. Somehow, Anthony Slater Has Made Life Work*, WASH. POST, Sept. 7, 1994, at C1.

14. Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989).

15. Dillon v. Frank, No. 90-2290, 1992 WL 5436, at *5, *10 (6th Cir. Jan. 15, 1992).

16. Watkins v. United States Army, 875 F.2d 699, 701–02, 711 (9th Cir. 1989).

17. *See, e.g.*, LEON E. PETTIWAY, HONEY, HONEY, MISS THANG: BEING BLACK, GAY, AND ON THE STREETS at xxxiv–xxxv (1996). Reporting of the black drag queens who are the subject of his book, Pettiway writes:

> They portray their mothers as matriarchs like those who have so often been depicted ruling their nests in sitcoms as well as the academic press . . . . [M]others are resourceful providers who are strong and determined, and who are the first lines of defense from both internal and external threats to their children's emotional and physical well-being. Therefore, in comparison to men, women are good.

*Id.* Consider also the subculture of (male or transgender) participants in competitive drag/voguing depicted in the documentary *Paris Is Burning*, who organize themselves into groups called "houses" whose leaders are called "mothers." PARIS IS BURNING (Miramax 1991). Filmmaker Jenny Livingston interviewed the mothers of two of the most successful houses. Although both were viewed as successful leaders (whether measured by number of followers attracted, satisfaction of the followers, competitive success of the members of the house, or general prestige), both also differed markedly in approach in ways that social scientists (although apparently not the two mothers themselves) would view as sharply gendered. One described the role of a "mother" as leading the house into battle, being tough, strong, and competitive; the other spoke of a "mother's" role as

Some further evidence that a berdache-like role may provide a safe space for young African American men who might otherwise be castigated as sissies comes from reports of community acceptance, indeed encouragement, of cross-dressing on the part of effeminate or homosexually inclined African American adolescents. Thus, the Lady Chablis, the African American drag queen who played a central role in *Midnight in the Garden of Good and Evil*,[18] sets forth in an autobiography the experience of some parental resistance,[19] but substantial community support, for an adolescent transition from "sissy" to "the woman [s/he had] become."[20] As Chablis puts it:

> I was the first openly and flamboyantly "gay" person I knew of in my hometown. That being the way, I guess I was protected by my family, much the way a retarded child is looked after. I mean, Gran'mama knew I was a sissy, and while I don't think she liked it, her boundless love for me would never have allowed her to harp on the fact that I needed to make drastic changes. Besides, she didn't believe in tampering with what was purely the Lord's business. And she made sure I knew that a higher power ultimately called the shots.[21]

While there are clearly dissimilarities and a lack of full acceptance, the process Chablis describes does have a certain resemblance to the Native American notion of the "cooking" of gender. Cooking, as Valdes describes it, "revealed gender: as the individual grew and incrementally performed and embraced one gender or another, or a mixture, he or she became that gender regardless of the genital anatomy under his or her garments."[22]

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comforter and nurturer of the members of the house. *Id.* (Again, remember that both mothers are genetic males flourishing in a subculture that glories in their effeminacy). Not only is strong leadership potential here identified with a female role, the voguing subculture also demonstrates that both stereotypically masculine qualities and stereotypically feminine qualities can be seen by a successful leader as the key to success. As the work of a white lesbian depicting the lives of gay men of color, Livingston's film has generated much critical commentary. *See, e.g.*, JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 121–40 (1993); BELL HOOKS, REEL TO REAL: RACE, CLASS, AND SEX AT THE MOVIES 214–26 (1996); JACQUELINE ZITA, BODY TALK: PHILOSOPHICAL REFLECTIONS ON SEX AND GENDER 182–201 (1998); Jackie Goldsby, *Queens of Language: Paris Is Burning*, *in* QUEER LOOKS: PERSPECTIVES ON LESBIAN AND GAY FILM AND VIDEO 108–15 (Martha Gever et al. eds., 1993). Of course, in writing this article, I run some of the same risks as Livingston, but I can see no way to avoid these risks short of avoiding the subject entirely.

18. JOHN BERENDT, MIDNIGHT IN THE GARDEN OF GOOD AND EVIL: A SAVANNAH STORY (1994), *adapted and released as a motion picture*, MIDNIGHT IN THE GARDEN OF GOOD AND EVIL (Warner Bros. 1997).

19. As the resistance included severe beatings by a mother and stepfather virulently opposed to Chablis's effeminacy and homosexuality, I do not mean to suggest that acceptance was complete and easy.

20. THE LADY CHABLIS WITH THEODORE BOULOUKOS, HIDING MY CANDY: THE AUTOBIOGRAPHY OF THE GRAND EMPRESS OF SAVANNAH 45 (1996) [hereinafter THE LADY CHABLIS, HIDING MY CANDY].

21. *Id.* at 39.

22. Valdes, *supra* note 1, at 217.

Chablis describes taking an early interest in feminine activities such as food preparation and hair care, which his grandmother indulged to a point and then resisted.[23] Initially upset by a failure to interest his twelve-year-old son in baseball, Chablis's father then enrolled him in a sewing course at the Harlem Institute of Fashion, where s/he was thrilled to meet another "[v]ery fem'nine" gay man wearing "pink ruffled shirts . . . [and] lotsa rings and bracelets."[24]

Much like a traditional berdache's, Chablis's "decision became final at puberty when the youth adopted female dress."[25] Also like a berdache, Chablis found particular support for this decision among the women of the community.[26] Thus, Chablis's early experiments in cross-dressing at age fourteen were facilitated by hand-me-downs from two neighbor girls and encouraged by female teachers who described Chablis's look as "so good, *so natural*"[27] and helped improve it with page boy hair-styling and lessons in mascara use.[28] S/he moved in with a sympathetic neighbor, Rhonda Conyers, and expanded her feminine wardrobe, which s/he wore everywhere but to church.[29] Soon the whole community was "donating something to my cause for womanhood" as well as calling the youth "Miss Benji" or "Miss Pee-Wee."[30]

> I never worried none about "passing." The kindly folks in Quincy already knew who and what I was, and they accepted me as Miss Benji or Miss Pee-Wee without any real degree of fanfare. While I wasn't exactly stuffing my bra, I did work my God-given illusions to the max. And enhanced now by the magic of Miss Rhonda Conyers, my cosmetic transition was all but complete. Whether it was a midriff and cutoffs or strippy-strappy sandals and rayon evening pajamas, there was no question that The Doll was coming of age just in time for her sixteenth birthday.
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> . . . .
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> . . . I was perceived as a girl 'cause I carried myself like one. And if I was ever regarded as an oddity, I was also a damn sure *likable* one![31]

The Lady Chablis's experience is not unique. Critical race theorist Kendall Thomas has, for example, recounted to me in conversation the

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23. *See* THE LADY CHABLIS, HIDING MY CANDY, *supra* note 20, at 39.
24. *Id.* at 44.
25. WILL ROSCOE, THE ZUNI MAN-WOMAN 22 (1991).
26. *Id.* at 22–23.
27. THE LADY CHABLIS, HIDING MY CANDY, *supra* note 20, at 61.
28. *Id.*
29. *Id.*
30. *Id.* at 65.
31. *Id.* at 67, 70.

similar story of one of his neighbors growing up.[32] Professor Thomas's account contains within it a sense of the community's fear of liminality, the sense that being squarely on one side of the line or the other is safer.[33] For Thomas, the neighbor boy's experience was an object lesson in the risk of letting his own feminine tendencies show—if they were spotted he might find himself pushed willy-nilly into a dress and a female role. This insistence on gender role as a package deal is, for me, the grim side of berdache, as the bright side, stressed by Valdes, is its willingness to let inclination and not simply anatomy dictate behavior.

Lest I be seen as confining my analysis of berdache to communities of color, treating them as exotica, let me use as my final illustration of the grim side of berdache an example from the mainstream upper-class white community of a New England prep school. The example, admittedly fictional, comes from the 1956 movie, *Tea and Sympathy*,[34] adapted from Robert Anderson's 1953 Broadway hit of the same name. The movie's central character, Tom Lee, is an effeminate adolescent whose father has sent him to prep school in hopes of "making a man" of him. Once they observe his feminine inclinations, however, his classmates seem determined instead to make a woman out of him, first letting him into the drama club only if he takes a female part and wears a dress; then calling him "sister boy," using female pronouns to refer to him, and mercilessly teasing him to the brink of suicide.[35]

Most of those around Tom Lee see only two options—two separate and opposite spheres, masculine and feminine—and they are determined to push him into one or the other.[36] Like the Native Americans Valdes

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32. Kendall Thomas, a Professor of Law at Columbia University School of Law, participated in the InterSEXionality Symposium sponsored by the University of Denver College of Law and *Denver University Law Review* on February 6–7, 1998.

33. Fear of the liminal may also have played a part in the sexual harassment of an earring-wearing teenage boy in *Doe v. City of Belleville*, 119 F.3d 563, 566 (7th Cir. 1997). Co-workers repeatedly asked Doe, "Are you a boy or a girl?" *Doe*, 119 F.3d at 566. They called him "bitch" and eventually grabbed him by the testicles in an attempt "to finally find out if you are a girl or a guy." *Id.* at 567. "The sense of distinction," writes Pierre Bourdieu,

> which demands that certain things be brought together and others be kept apart, which excludes . . . all unions contrary to the common classification[,] . . . responds with visceral, murderous horror, absolute disgust, metaphysical fury, to everything which lies in Plato's "hybrid zone," everything . . . which by challenging the principles of the incarnate social order, especially the socially constituted principles of the sexual division of labor and the division of sexual labor, violates the mental order, scandalously flouting common sense.

PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE, ch. 4 (Richard Nice trans., Harvard Univ. Press 1984) (1979).

34. TEA AND SYMPATHY (MGM 1956), *adapted from* ROBERT WOODRUFF ANDERSON, TEA AND SYMPATHY (Random House Play 1953).

35. *Id.*

36. While Tom's classmates sought to categorize him as an effeminate homosexual, similar childhood experiences shaped Christine (born George) Jorgensen's decision to seek a sex change. Jorgensen reported being accused of carrying school books like a girl or being a girl dressed in boys' clothing. *See* CHRISTINE JORGENSEN, A PERSONAL AUTOBIOGRAPHY 16 (1967). An elementary-school teacher who found a piece of needlepoint in Jorgensen's desk called Jorgensen's mother to

described, their view is that, "You can't escape from what you are, your character."[37] The manliness of Tom's character is put in doubt by his taste for chintz curtains and flowers, folk songs and poetry, and by his unwillingness to get a crew cut or plaster his walls with pinups from girlie magazines. Like the male berdache, Tom prefers spending time with women doing women's tasks—his troubles come to a head when his classmates observe him opting to join the faculty wives' sewing circle rather than accompany the boys on an athletic romp.[38] Tom sews quite well. He is also the school's tennis champion; unfortunately, he wins by "playing like a girl," causing his classmates to deride his championship game as "the mixed singles final."[39] But to isolate Tom in a feminine sphere where "the nasty rough boys can't hurt" him is no more fair to his inclinations than to force him into conventional manliness.[40] As his headmaster's wife, Tom's only defender, puts it: "Manliness is not all swagger and swearing and mountain climbing. Manliness is also tenderness, gentleness, consideration."[41]

I propose to read *Tea and Sympathy* straight.[42] That is to say I shall take at face value that it is not about a repressed gay youth, who today might come out of the closet. Instead, it is about an unusually sensitive and feminine heterosexual boy, who ends his prep school career in the arms of his headmaster's wife (his love object throughout the movie), a boy who, in the movie's epilogue, is revealed to have grown into a happily married man and an accomplished author.

In addition to the tendency to polarize gender, another disturbing tendency in the berdache tradition is the tendency to push effeminate men, as well as masculine women, toward homosexuality.[43] It also tends to push everyone, whether gender conforming or cross-gendered, erotically toward his or her opposite. What is interesting about *Tea and Sym-*

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school to ask, "[D]o you think this is anything for a red-blooded boy to have in his desk as a keepsake? The next thing we know George will be bringing his knitting to school." *Id.* at 15. On one account, then, the berdache tradition may free people like Lee and Jorgensen from needing to keep or acquire one part of what has been the socially accepted package deal of sex, gender, and orientation—it allows them to take up their sewing without first having to acquire a vagina. Although it may package gender and add to it orientation, berdache does not prescribe genital conformity to this package.

37. TEA AND SYMPATHY, *supra* note 34.

38. This marks an important difference between the play and the movie adaptation. While the movie's central theme is gender, the play's is sexual orientation. Thus, in the play, Tom Lee's troubles trace to his being observed, not sewing with the faculty wives, but going for a swim in the nude with an unmarried male instructor.

39. TEA AND SYMPATHY, *supra* note 34.

40. *Id.*

41. *Id.*

42. Pun intended.

43. Perhaps the only instances in contemporary American culture in which homosexual identity may be externally imposed may be certain genderbenders—effeminate boys and tomboys—pushed into gay identity by an outside world only too ready to typecast.

*pathy* is that Tom Lee is drawn erotically toward his like, but his like in terms of gender, not of sex: He wants a soft, romantic, loving view of sex and resists the rough, loveless, promiscuous masculine view of sex that he is pushed to seek with the lower class waitress to whom all the other boys go when they want to get laid. Instead, he finds his sexual and romantic ideal with someone who is (a) of the opposite sex, but also (b) of the same gender. As I understand the berdache tradition, it cannot accommodate the world's Tom Lees much more comfortably than can the Euro-American conflation Valdes rightly criticizes.[44]

The problem with the berdache model is that it is a package deal. And I resist package deals. Perhaps this is because I studied antitrust law at an impressionable age. United States antitrust law prohibits what is known as a tying arrangement—an arrangement by which customers can acquire a product they really want only on condition that they also purchase another in which they have no interest.[45] Berdache and the world of separate spheres in which it is imbedded force people into accepting such tying arrangements—it forces them to acquire the whole of a gendered package to get the part of it that suits them.

Berdache is not a solution to the problem of separate spheres, although it is concededly an improvement over a world in which assignment to those spheres is by biological sex alone. In the traditional nineteenth-century American world of spheres separated by sex, for example, Myra Bradwell was told by a Justice of the U.S. Supreme Court that, as a woman, she could not be licensed to practice law because it was "the domestic sphere . . . which properly belongs to the domain and functions of womanhood."[46] It would not be enough of an improvement if Bradwell's twentieth-century female counterpart were to be told instead that she can practice law only if she is a butch lesbian. This would be unfortunate both for individual human freedom and for the practice of law, which, as Bradwell's lawyer Matthew Hale Carpenter argued to the Supreme Court, can benefit from both masculine "sternness" and a "silver [feminine] voice."[47]

Now that the *Bradwell* case has been repudiated, how clear is it that American constitutional law also repudiates package deals for the sexes?

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44. Even among those accepting of homosexuality and transgenderism, persons who desire others of the same gender can lack for acceptance. Although she apologizes by the end of the novel, Jess, the transgendered heroine of *Stone Butch Blues*, is initially distressed by the relationship between two of her butch friends: "The more I thought about the two of them being lovers, the more it upset me. . . . [T]wo butches? How could they be attracted to each other? Who was the femme in bed?" LESLIE FEINBERG, STONE BUTCH BLUES 202 (1993).

45. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958). These days, some antitrust scholars do not think much of the prohibition on tying, but their criticisms reached me too late to have much influence on my personal intellectual history. For a scathing critique of prohibitions on tying, see ROBERT H. BORK, THE ANTITRUST PARADOX 365–81 (1978).

46. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

47. *Bradwell*, 83 U.S. at 137.

Concurring in *United States v. Virginia*,[48] Chief Justice Rehnquist insisted:

> [I]t is not the "exclusion of women" [from the state-sponsored Virginia Military Institute] that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any—much less a comparable—institution for women . . . . An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the Commonwealth does not need to create two institutions with the same number of faculty Ph.D.'s, similar SAT scores, or comparable athletic fields. Nor would it necessarily require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber.[49]

This sounds suspiciously like a vision of separate (but equal) spheres, a vision of equality in sexual difference often announced, but never, to my mind, realized.[50] As with the separate but equal racial spheres categorically rejected in *Brown v. Board of Education*[51] and its progeny, much of the problem with constitutionally endorsed, state enforced separate spheres for the sexes may be a practical one—as Justice Souter noted at oral argument in *United States v. Virginia*, because we do not stand "on the world's first morning"[52] with respect to sex distinctions, but rather at the close of millennia of subordination, continued separation of the sexes along the remedial lines suggested by Rehnquist cannot be free of subordinating taint.[53]

I would argue, however, that the objections go beyond impracticability. There are two main ways of formulating the principle behind the constitutional norm against the denial of equal protection on grounds of

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48. 518 U.S. 515 (1996).

49. *Virginia*, 518 U.S. at 565 (Rehnquist, J., concurring) (internal citation omitted).

50. Lest one think that, pace Rehnquist, there is no realistic likelihood of a court's endorsement of separate spheres under current American law, consider, for example, *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), involving the sex-segregated sphere of the prison. In that case, the circuit court held it to violate the rights of neither male nor female prisoners for a prison system to choose to allocate resources so that female prisoners, but not males, were allowed overnight visits with their children, while male prisoners, but not females, were given extensive vocational training. *Klinger*, 31 F.3d at 732–33.

51. 347 U.S. 483 (1954).

52. United States Supreme Court Official Transcript at 18, United States v. Virginia, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107), *available in* 1996 WL 16020, at *18.

53. To the extent that the anti-subordination and anti-differentiation goals of the constitutional law of sex discrimination are in tension, Rehnquist emphasizes anti-subordination, for example by repeatedly objecting to heightened scrutiny for laws favoring men. *Virginia*, 518 U.S. at 559–60, 565. For further discussion, see Mary Anne Case, The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies (unpublished manuscript on file with the author).

sex. The first is that women should not be subordinated, by the law or, more broadly, by men. The second is that sex should be irrelevant to an individual's treatment by the law, and, more broadly, to his or her life chances. On the latter view, "fixed notions concerning the roles and abilities of males and females"[54] are problematic when embodied in law, even in law that does not in any articulable way subordinate women to men. Our current constitutional law of sex discrimination clearly and, I would argue, appropriately, encompasses this latter view, and does not limit itself to questions of subordination.

The constitutional principle that "[t]here is no caste here"[55] is not cashed out by "[t]here is no subordination" here. "Our Constitution . . . neither knows nor tolerates classes among citizens," not even separate but equal classes.[56] Imagine, for example, a society with two castes, not upper and lower, not Brahmin and untouchable, but priest and warrior. This is not all that far-fetched a hypothetical, at least in its assumption that there can be equality in difference. Consider, for example, the estates of the clergy and nobility in medieval and early modern France. The relationship between these, the First and Second Estates, presents a somewhat different problem than the conventional one of subordination framed by the position of the Third Estate. Both clergy and nobility ran the gamut of wealth and power, from the impoverished country squire and village priest to the prelates and princes of the royal line. And the two estates were distributed throughout the land. Although nominally the clergy was the premier estate, the nobility was hardly subordinate. Role differentiation, rather than inequality, marked the difference between the two. The two castes are roughly equal in status, but radically different in role. Those assigned to the priest caste are limited to the role of priest even if they would rather fight than pray, and vice versa. Is such a division consistent with the American Constitution? I don't think so.[57]

Ironically, strong support for the proposition I am here advancing comes from none other than Justice Bradley, who, in his *Slaughterhouse* dissent, asked:

> [I]f a State legislature should pass a law of caste, making all trades or professions, or certain enumerated trades and professions, hereditary, so that no one could follow any such trades or professions except that

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54. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

55. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

56. *Plessy*, 163 U.S. at 559.

57. *See, e.g.*, Wright v. Rockefeller, 376 U.S. 52, 63–64 (1964) (Douglas, J., dissenting) (rejecting as un-American the Indian system of allocating parliamentary seats by religion and ethnic group). I realize I am building my argument here largely from dissenting Supreme Court opinions, but this, too, has become part of the American constitutional tradition, which has come to accord special status to eloquent and prescient dissents, from Harlan in *Plessy v. Ferguson* to those of Holmes and Brandeis in the free speech cases. *See, e.g.*, HARRY KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 158 (1988).

> which was pursued by his father, would such a law violate the privileges and immunities of the people of that State . . . ?[58]

He then answered:

> In my view, a law which prohibits a large class of citizens from adopting a lawful employment . . . does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws . . . .[59]

As Harlan's *Plessy* dissent makes clear, the problems with equality of separate spheres exceed the practical—the Constitution guarantees liberty as well as equality; indeed, the constitutional equality norm itself has regularly been interpreted to guarantee equal liberty. I would say of Rehnquist's remedy for *United States v. Virginia* what Harlan said of the legislation at issue in *Plessy*: "Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States."[60] My contention is that, under the Constitution, no less than under Title VII,[61] "[a]s for the legal relevance of sex stereotyping, we are beyond the day when [individuals of either sex can be] evaluate[d] by assuming or insisting that they match[] the stereotype associated with their group."[62] This is so whether or not that stereotype is itself subordinating or demeaning.

Substituting a berdache-like system of preferences for de jure exclusion of one sex from the other's activities or professions would not solve the problem, as the Supreme Court suggested in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[63] In that case, the passage of laws prohibiting sex discrimination in employment led a newspaper

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58. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 113 (1872) (Bradley, J., dissenting).

59. *Id.* at 122. Bradley viewed it as a settled question that the law he hypothesized would be a violation of privileges and immunities; the only question he considered was whether the violation was of the privileges of federal as well as state citizenship. *See id. But see* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 562 (1947) (upholding a licensing scheme for New Orleans river pilots that in effect allowed "the male members of a family [to] follow the same work from generation to generation" and closed that line of work to all without family connections). Once again in *Kotch*, the position I am advocating here is put forth by the dissent, which insisted that, even if it were to prove the most efficient means of selecting pilots, a selection system based on blood relationship, like one based on "race, color, creed and the like," is forbidden by the U.S. Constitution. *See Kotch*, 330 U.S. at 566 (Rutledge, J., dissenting). This is very much in line with the rejection of even very good proxies in modern constitutional sex discrimination cases.

60. *Plessy*, 163 U.S. at 1145.

61. Civil Rights Acts of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

62. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989). Note that the rejection of comparable worth as even a statutory, let alone a constitutional, principle in American law, can be seen as a rejection of the equalization of separate spheres as a solution to women's subordination.

63. 413 U.S. 376, 388–89 (1973) (holding that a local anti-discrimination ordinance prohibiting a newspaper from classifying help-wanted ads by sex did not violate the newspaper's First Amendment rights).

merely to change the headings on its help wanted ads to classify jobs no longer as "help wanted male" or "female," but instead as "male interest" or "female interest."[64] Like the proxies used to generate the sex respecting rules struck down by the Court in constitutional cases, this classification by interest probably was accurate more often than not. But the self-reinforcing stereotypical assumption that male and female interests fall in separate spheres was held unacceptable in the statutory as it has also been in the constitutional context.[65]

Although I do not urge an abolition of conventional gender categories, I am troubled by the alternative of berdache because I am also not committed as either a descriptive or a normative matter to the preservation of these categories. I would neither be particularly surprised nor particularly disappointed if masculinity and femininity as we today define them were to be amalgamated, to be diversified, or to wither away in future generations. I, therefore, worry about two sorts of potential gender essentialism—not merely the essentializing of women as feminine, but the essentializing of the feminine itself. Separate gendered spheres, however open to persons of both sexes, increase the risk of reifying current definitions of masculine and feminine, which I would prefer had more room to develop, even to disappear.

If not berdache, what would serve as a useful model for the disaggregation of sex from gender? As I have already observed, it may seem doubly paradoxical to suggest both that gender can be disaggregated from sex and that it may then wither away. After all, gender now is defined as that which is deemed culturally appropriate for members of a particular sex. If gender to begin with is defined entirely in terms of sex, a disaggregation, if conceivable at all, seems likely to involve reifying those bundles of characteristics associated with masculinity or femininity at the time they are split off from maleness or femaleness. There are, however, historical precedents for the sort of conceptual shift I am here imagining, and a brief discussion of two of them may help illuminate the point.[66]

The first analogous precedent is that of the categories "noble" and "base;" the second is that of the humors or temperaments. Both examples involve classification schemes once quite prevalent, but which have lost virtually all significance in our contemporary American society.[67] In each case, the categories were, like that of gender, originally seen to have a physiological base from which they were then conceptually disaggregated. Thus, those with noble blood were seen to possess a variety of desirable characteristics the base-born lacked, from good bone structure

64. *Pittsburgh Press Co.*, 413 U.S. at 379–80.

65. Again, for further discussion, see Case, *supra* note 53.

66. *See* Case, *supra* note 1, at 105 n.261 (exploring the historical precedents).

67. Although surely not in all societies, as British members of the audience rightly insisted when I delivered a version of this argument at the 1996 Law and Society conference in Glasgow.

to good character, to grace and virtuosity. But as early as the time of Chaucer, the qualities associated with nobility could be disaggregated from the bloodlines that were thought to give rise to them and those possessing such qualities could be characterized as noble regardless of their actual class origin. "[H]e is gentil [i.e., noble] that dooth gentil deedes," says Chaucer's Wife of Bath,[68] although for centuries thereafter in literature, apparently base-born people who behaved nobly usually turned out to have been switched at birth. Similarly, today, some transsexuals assert that because they manifest feminine gender characteristics in a male body, they must have been assigned to the wrong sex.

Over time, the qualities associated with nobility not only took on a life of their own, far removed from their origins, but noble/base also ceased to be an important fault line in the categorization of human beings in this society. This is not at all to argue that class distinctions have lost their meaning. But, in contemporary America at least, class has not only become more fluid than it was in medieval Europe, it has also become far less of a package deal. The qualities seen as united of necessity in an individual medieval or Renaissance nobleman are in the United States today acknowledged to be dispersed over a wide variety of elites, such as those defined by ancestry (e.g., Mayflower descendants), education (e.g., Ivy League grads), wealth (e.g., members of the Forbes 400), looks (e.g., supermodels), talent (from Nobel prize winners to Hall of Fame athletes) and power. Of course, some individuals do possess most or all the marks of high status. But it is no longer assumed that to possess one, one must possess the others.

The first step in this process of disaggregation came when nobility was viewed as something one could manifest by one's behavior rather than simply through one's blood lines. Today, all men are or can be gentlemen and all women ladies.[69] And, for example, although the word "villain" still has contemporary significance, it has lost all resonance of its etymological origin in "villein" or "base-born." As Richard Rorty suggests, perhaps the distinctions and androcentric value judgements today associated with sex and gender may some day be forgotten, "just as we have forgotten all about the discussion between base and noble ancestry."[70]

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68. Geoffrey Chaucer, *The Wife of Bath's Tale*, *in* CHAUCER'S POETRY 228 (E.T. Donaldson ed., 2d ed., Ronald Press Co. 1975).

69. And all women gentlemen as well? *See* LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 85 (1997) (describing a Yale Law School professor's justification of addressing all in his class, regardless of sex, as "gentlemen," since women law students, too, should cultivate the civilized detachment associated with the gentlemanly ideal); *cf.* LUISE F. PUSCH, ALLE MENSCHEN WERDEN SCHWESTERN (1990) (exploring the difference in emphasis created by change in gender of words, e.g., when "alle Menschen" ("all human beings") are described as "sisters" ("Schwestern") instead of "brothers").

70. Richard Rorty, *Feminism and Pragmatism*, 30 MICH. Q. REV. 231, 248 (1991).

A world in which people can, if they wish, forget about sex and gender distinctions, a world in which the possibilities of liberal individualism and universalism can be better realized, strikes me as more attractive than one in which sex and gender necessarily retain their salience but change some of their valence. Thus, for many of the same reasons I resist Valdes's enthusiasm for berdache, I am not satisfied by Rorty's alternative vision, in which women have the chance, previously denied them, to find their moral identity in being women. According to Rorty:

> To find one's moral identity in being an X means being able to do the following sort of thing: make your Xness salient in your justification of important uncoerced choices, make your Xness an important part of the story you tell yourself when you need to recover your self-confidence, make your relations with other X's central to your claim to be a responsible person. These are all things men have usually been able to do by reminding themselves that they are, come what may men. They are things which men have made it hard for women to do by reminding themselves that they are women.
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> . . . .
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> . . . [W]omen are only now in the process of achieving a moral identity as women.[71]

While I have no objection if those women who wish to do so find their moral identity in being women, I no more see this as the utopian ideal than I do an equalization of separate spheres. For me, it is only when women *can*, but *need not*, find a moral identity in being women, that women's liberation will have come. To put this in Rorty's terms, this day will come when the poet Adrienne Rich can join the club of poets if she wishes, and be welcomed to membership by poets of both sexes. For me it is not enough if Rich is restricted to the option Rorty imagines for her, that of starting a "feminist separatis[t]" club of female poets once she realizes she can never be one of the "band of brothers," the "invisible club" of "young male" poets from Byron and Goethe to their present day male counterparts.[72]

Pressing too closely the analogies between noble and base and masculine and feminine would not be in the interests of someone like myself who wants feminine qualities to be more highly valued than they have been, however. This is because even today we still think villains are bad, and we still associate goodness with most things previously deemed noble. Indeed, just about the only item I can think of whose valence has clearly shifted is bread—whole grain bread was once consumed by peasants and despised by nobles, who preferred white bread made of refined flour. Today, white bread is more closely associated with the lower classes, while those of higher status tend to prefer whole wheat or even seven grain bread.

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71. *Id.* at 243–44.
72. *Id.* at 246.

The more the masculine is seen to resemble the noble, the less space remains for the feminine, even (indeed especially) in a world in which masculinity, like nobility, is seen as open to all who choose it. For this reason an analogy to the concept of the humors, which did not embody the stark normative contrast of good and bad, may be helpful in addition. Temperaments such as the melancholic or choleric were originally seen as dictated by and associated with a specific physiology "and the words carried much weight that they have since lost: e.g., the choleric man was not only quick to anger but also yellow-faced, lean, hairy, proud, ambitious, revengeful and shrewd."[73] Today, however, although to describe someone as choleric is not meaningless, we have not only ceased to view persons of choleric temperament as by nature hot and dry and filled with an excess of yellow bile, we are also quite unlikely to use the humors as a basis for categorizing or evaluating people in the first place.

My final analogy is much more up to date. If, as some have suggested, choosing sexual orientation can be analogized to choosing clothing, then the separate spheres of the berdache tradition may be akin to "getting your colors done." Those who followed this theory of fashion, popular in the 1980s and enjoying a recent revival, were categorized on the basis of skin tone, eye, and hair color. "Everybody was forced into four categories—winter, spring, summer, autumn. And sometimes that one category wasn't the best choice, but it was the only choice."[74] Someone categorized as an "autumn" was directed to wear only autumn colors and to purge her wardrobe of all other pieces of clothing, no matter how attached to them she had become. I think we ought to be able to include in our wardrobe any variety of things we wish, whether that be all autumn colors and nothing but autumn colors or all the colors of the rainbow. And we ought to be able to include in our lives whatever combination of gendered traits we wish, regardless of whether they have previously been put together into a package deal.

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73. Britannica Online, *Humour* (visited Dec. 6, 1998) <http:www.eb.com:180/cgi-bin/g?DocF=micro/281/67.html>.

74. Janet McCue, *Color Me Blue*, CLEV. PLAIN DEALER, Nov. 30, 1995, at 1E. The fact that new versions of "Color Me Beautiful" have expanded the number of options to twelve may be an improvement, but, from my perspective, not a solution to the problem. *See* MARY SPILLANE & CHRISTINE SHERLOCK, COLOR ME BEAUTIFUL'S LOOKING YOUR BEST: COLOR, MAKEUP, AND STYLE 22–23 (1995), the follow-up to CAROLE JACKSON, COLOR ME BEAUTIFUL : DISCOVER YOUR NATURAL BEAUTY THROUGH THE COLORS THAT MAKE YOU LOOK GREAT AND FEEL FABULOUS! (1980).

# STORIES FROM THE GENDER GARDEN: TRANSSEXUALS AND ANTI-DISCRIMINATION LAW

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## I. THE BEGINNING

*It was only a dream, but it seemed real at the time.*

*I stood in the middle of a forest and looked into a stream of water, much as Narcissus must have done. The water reflected as clearly as a mirror. When I saw my reflection, I said: "I am a flower."*

*The trees of the forest came alive and spoke. "You are a daffodil," they said. But I knew otherwise.*

*"No, a hyacinth," I said.*

*We could not agree. I was one or the other and we could not agree.*

*Then the god of light and wisdom appeared. The god said that I was both a daffodil and a hyacinth and I was happy.*

*But then the rule was written. The rule said: "A flower is special and cannot be harmed." The interpreters said that a daffodil was a flower and a hyacinth was a flower. At first, I felt protected and warm.*

*Then one day I was threatened by a great wind. I said to the wind: "I am a flower and you cannot harm me." The wind began to hum. Then the wind began to laugh. "You are not a flower," said the wind. "You are not a daffodil and you are not a hyacinth."*

*"Yes, I am. I am both daffodil and hyacinth."*

*And as the wind blew over me and trampled me to the ground, I heard it say: "Not a flower, not a flower, not a flower."*

*And the interpreters agreed with the great wind. "A daffodil/hyacinth is not A flower," said the interpreters. "If you are both, you are neither. You are not A flower and you are not protected. Only A flower is special."*

*I protested, but to no avail. If a daffodil is special and a hyacinth is special, then shouldn't a daffodil/hyacinth be even more special? Is it not worse to destroy both?*

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The dream is easy to explain. It is spring and, despite the recent snows in the Midwest, my daffodils are starting to bloom. The hyacinth was my favorite flower in childhood, but only the blue ones. I used to crush their blooms into pixie dust so that I could fly. Sometimes I was Peter Pan. Sometimes I was Superboy (but never Supergirl).

For months now I have immersed myself in the stories of female to male transsexuals (FTMs), "boychicks" who are considering some form of physical transition from femaleness to maleness, and butch lesbians who embrace their female bodies while also embracing forms of masculine gender expression. My reading has also included stories of male to female transsexuals (MTFs). In addition, I have read every case of discrimination against such people that has been reported in the federal or state reporters. Most discrimination cases involve MTFs, but there are a handful of cases in which FTMs are plaintiffs. The message from the courts to the plaintiffs is the same in both cases: Men are protected from discrimination and women are protected from discrimination, but you, as a transsexual, are not protected. You are not a "sex." You are something else.

The stories of butch lesbians, especially from the 1960s and 70s, contain similar themes of rejection. This period was the heyday of civil rights activism and the era of origin for anti-discrimination laws that focus on sex and gender. For butch lesbians, it was not the legal system that threatened their claims to masculine identity in a female body. Rather it was the feminist community, and in particular lesbians within that community, who began demanding that for lesbians to be true feminists they must be "woman-identified."[1] Butch or masculine-identified women were suddenly "politically incorrect."[2]

Similarly, progressive lesbian communities of the 1980s and 90s have policed their borders by rejecting MTF transsexuals who claim lesbian identity in a post-op female body. The Michigan Womyn's Music Festival, for example, adopted a "womyn born womyn" rule in 1992 to protect their female-only space.[3]

It seems, then, that in American law and society, sex is either male or female. Gender is either masculine or feminine. Furthermore, masculine gender is expected to correlate to male sex, feminine gender to fe-

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1. "Because the proposition that lesbianism is an intensified form of female bonding has become a belief, thinking, acting, or looking like a man contradicts lesbian feminism's first principle: the lesbian is a 'woman-identified woman.'" Esther Newton, *The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman*, 9 SIGNS 557, 557–58 (1984).

2. *See* Jeanne Cordova, *Butches, Lies, and Feminism*, *in* THE PERSISTENT DESIRE: A FEMME-BUTCH READER 272, 272 (Joan Nestle ed., 1992).

3. *See* Nan Alamilla Boyd, *Bodies in Motion: Lesbian and Transsexual Histories*, *in* A QUEER WORLD: THE CENTER FOR LESBIAN AND GAY STUDIES READER 134, 143–45 (Martin Duberman ed., 1997) (discussing exclusion of transsexual women from Michigan Womyn's Music Festival).

male sex. Persons who do not fit these categories are unprotected by the laws that prohibit discrimination on the basis of sex.[4] And persons who blend masculine and feminine characteristics or one sex (e.g., female) with the opposite gender (e.g., masculine) risk rejection, not only by our legal institutions, but also by progressive communities.

Title VII[5] protects employees against discrimination on account of sex.[6] Numerous state statutes protect persons from sex discrimination in employment,[7] housing,[8] credit,[9] and education.[10] At least ten states and the District of Columbia have statutes that prohibit discrimination on the basis of sexual orientation.[11] And Congress is considering once again the Employment Non-Discrimination Act, which would make employment discrimination on the basis of sexual orientation illegal in all states.[12] With two exceptions,[13] none of these statutory protections offers any protection to transsexual or transgendered individuals.[14]

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4. *See, e.g.*, Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 473 (Iowa 1983) (holding that a transsexual in transition cannot claim discrimination on the basis of sex because "the common usage of the word sex denotes male or female, but not both").

5. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

6. *Id.* § 2000e-2.

7. *See, e.g.*, MINN. STAT. § 363.03 (1996).

8. *See, e.g.*, N.H. REV. STAT. ANN. § 354-A:10 (Supp. 1997).

9. *See, e.g.*, CONN. GEN. STAT. § 46a-81f (1997).

10. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 76, § 5 (West 1996).

11. *See* CONN. GEN. STAT. § 46a-81d; D.C. CODE ANN. § 1-2512 (1981); HAW. REV. STAT. § 378-2 (1993); ME. REV. STAT. ANN. tit. 5, § 4553-10(G) (West Supp. 1997); MASS. GEN. LAWS ANN. ch. 151B, § 4; MINN. STAT. § 363.03; N.H. REV. STAT. ANN. § 354-A:10; N.J. STAT. ANN. § 10:5-12 (West 1993 & Supp. 1998); R.I. GEN. LAWS § 28-5-7 (1995); VT. STAT. ANN. tit. 3, § 961(6) (1995); WIS. STAT. ANN. § 111.36(d) (West 1997).

12. Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. The Senate rejected the Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong., by a vote of 50 to 49. 142 CONG. REC. S10,129 (daily ed. Sept. 10, 1996).

13. The exceptions are Minnesota (by statute) and New York (by case law). The Minnesota human rights laws prohibit discrimination in employment on the basis of sexual orientation. MINN. STAT. § 363.03. "Sexual orientation" is defined as:

> [H]aving or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, *or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.*

*Id.* § 363.01 (emphasis added).

A New York court, in *Maffei v. Kolaeton Industry, Inc.*, provided protection to transsexuals under New York City law by interpreting "sex" to include transsexuals. 626 N.Y.S.2d 391, 395–96 (App. Div. 1995) (rejecting, as "unduly restrictive," the federal courts' position that Title VII's proscription against sex discrimination does not protect transsexuals). While the *Maffei* decision was ambiguous as to the applicability of New York state law to transsexuals, a reasonable interpretation of the decision, including its discussion of the more expansive nature of the state law as compared to Title VII, indicates that the court recognized protections for transsexuals under New York state law as well. *See id.* at 392–96; *see also* Rentos v. Oce-Office Sys., 95 CIV. 7908 LAP, 1996 WL 737215, at *9 n.3 (S.D.N.Y. Dec. 24, 1996) (interpreting the *Maffei* decision to protect transsexuals under New York state, as well as city, law). In *Rentos*, a federal court applying New York state and city law denied defendant's motion to dismiss, recognizing that the *Maffei* decision indicated that the transsexual plaintiff potentially had a claim under these laws. *See id.* at *8–*9 ("Any ambiguity as to

Why is it that our jurisprudence has developed a notion of sex, gender, and sexual orientation that completely excludes transsexual or transgendered persons? Are transsexual persons neither male nor female under the law, and thus undeserving of protections that are available for men and for women? Is our understanding of "discrimination on the basis of sex" so limited that it cannot accommodate the situation of a person who was assigned one sex at birth, but has developed a different gender identity throughout life? And how does our anti-discrimination jurisprudence accommodate the biologically intersexed person or hermaphrodite, whose sex and gender are blurred so as to defy classification in our binary system?

Perhaps the problem is not with our jurisprudential vision, but with our inability to visualize what it means to be transsexual or transgendered. And if, as it appears, some of our most progressive political communities experience difficulty with the blending of genders and sexes, then perhaps we need to do some additional consciousness-raising on the situation of transsexuals.

The purpose of this article is to enrich our understanding of transsexuals and transgendered persons so that we can better determine whether their experiences of discrimination ought to fall within existing legal categories or whether we need to create new legal categories. To this end, I will employ the method that feminist legal theorists of the 1970s and 80s used to develop new legal theories for the benefit of bat-

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the plaintiff's protected status is . . . merely reflective of the present state of the law, and the complaint clearly alleges membership in what [the *Maffei*] court has found to be a protected class under city and state law.").

14. Although courts consistently interpret Title VII to exclude transsexuals from antidiscrimination protection, *see Rentos*, 1996 WL 737215, at *7 ("Every federal court that has considered the question has rejected the application of [Title VII] to a transsexual claiming employent discrimination."), Title IX has recently been applied in a sexual harassment case in which the plaintiff was a transsexual, harassed because she appeared female to the harasser. *See* Miles v. New York Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997) ("There is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to [the harasser] and everyone else at the university, plaintiff was not a biological female."). Title IX's sex discrimination language is equivalent to the language in Title VII. *Compare* 20 U.S.C. § 1681(a) (1994) (Title IX language: "No person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program . . . ."), *with* 42 U.S.C. § 2000e-2(a) (1994) (Title VII language: "It shall be unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex."). Thus, the two statutes should be interpreted to apply to similar discriminatory behavior. *See Miles*, 979 F. Supp. at 249–50 & n.4 (recognizing that "it is now established" that the sex discrimination language in Title VII and Title IX are interpreted in the same manner). In addition, the Supreme Court's reasoning in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a case in which a woman was discriminated against for not being feminine enough, signals the possibility for future application of Title VII to cases involving transsexuals. *See Price Waterhouse*, 490 U.S. at 240 (finding "because of such individual's . . . sex" language in Title VII "mean[s] that gender must be irrelevant to employment decisions"). The Court's discussion in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998), also contains language which might support future claims by transsexual plaintiffs. *See Oncale*, 118 S. Ct. at 1002 (stating that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils").

tered women and women in the workplace who were harassed. That method entails listening to and believing stories of the oppressed—"stories from the bottom," as Mari Matsuda would call them.[15]

Part II of this article will outline briefly what I mean by feminist method. In Part III, I will describe what I mean by "differently gendered persons." Part IV focuses on the stories of differently gendered persons. After making some preliminary observations about those stories in Part V, I conclude in Part VI with some suggestions for legal reform in the area of anti-discrimination law.

## II. FEMINIST METHOD

### A. *Consciousness-Raising as Feminist Method*

As Chris Littleton explained years ago: "Feminist method starts with the very radical act of taking women seriously, believing that what we say about ourselves and our experience is important and valid, even when (or perhaps especially when) it has little or no relationship to what has been or is being said about us."[16] For me this is still the starting place for constructing feminist legal theories, listening to and believing women's stories. It means holding back the critiques and the judgments until the story has been heard in full—with empathy and understanding.

Some feminist theorists have described this process as akin to consciousness-raising.[17] Imagine a group of women sharing with each other their stories and perspectives—stories and perspectives they have never shared before; for some out of fear, for some as a result of the indifference of available listeners. The process builds a new understanding of previously silenced experiences and the women sharing in the process gain insights about their own stories.

Consciousness-raising has been described as the "personal reporting of experience in communal settings to explore what has not been said."[18] It enables "feminists to draw insights and perceptions from their own experiences and those of other women and to use these insights to challenge dominant versions of social reality."[19]

This process of telling and hearing stories is credited with the formulation of legal theories dealing with sexual harassment, pornography,

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15. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); *see also infra* notes 36–37 and accompanying text (providing further discussion of Matsuda's term).

16. Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 764 (1989) (reviewing CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987)).

17. *See, e.g.*, Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863–67 (1990) (discussing consciousness-raising through the articulation of experiences as a "feminist method for expanding perceptions").

18. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 64 (1987).

19. Bartlett, *supra* note 17, at 866.

battered women, and rape.[20] It has also helped us to understand connections between sexism and racism.

There is a risk to this form of feminist method. For example, Andrea Stuart argues that "[e]ncounter groups and consciousness raising seem[ ] most pertinent to a privileged few, largely white and middle-class, who [are] lucky enough to be able to put to one side issues of race and class . . . ."[21] Critics charge that consciousness-raising may produce a feminist "movement side-tracked by a peculiarly narcissistic dimension of 'the personal is the political.'"[22] Others charge that the consciousness-raising "model 'works' mainly in a culture that prioritizes individual, rather than collectivist, strategies and solutions."[23]

"Difference feminism" has emerged from this method, offering a critique of reality from the perspective of women, a perspective that is claimed to be different from that of men.[24] To the extent difference feminism has relied on or even suggested the existence of a monolithic and coherent woman's standpoint, it has been criticized for its failure to include the voices and viewpoints of diverse women. Racial critiques[25] and lesbian critiques[26] have claimed that feminist standpoint theories too often ignore the realities and experiences of women of color and lesbians. Thus, according to these critiques, the truths such standpoint theories offer are only partial.

I have argued elsewhere that lesbian experience must be understood and included in feminist critiques.[27] Legal solutions that ignore lesbian experience may contribute to the continued subordination of lesbians. Such solutions are not really feminist, for feminism means working against the subordination of all women. Relational or cultural feminist[28] arguments that value the biological connection between mother and

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20. *See, e.g., id.* at 864–65; *cf.* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 642–48 (1986) (addressing the effects of feminist thought and discourse on sexual harassment and battered women).

21. Andrea Stuart, *Feminism: Dead or Alive?*, *in* IDENTITY: COMMUNITY, CULTURE, DIFFERENCE 28, 37 (Jonathan Rutherford ed., 1990).

22. *Id.*

23. Kobena Mercer & Isaac Julien, *Race, Sexual Politics and Black Masculinity: A Dossier*, *in* MALE ORDER: UNWRAPPING MASCULINITY 97, 122 (Rowena Chapman & Jonathan Rutherford eds., 1988).

24. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (discussing the existence and implications of distinctions between male and female modes of observation and communication).

25. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

26. *See, e.g.*, Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989).

27. *Id.*

28. Difference feminism is sometimes called cultural feminism and cultural feminists often stress relationships between women and children. *See, e.g.*, Susan H. Williams & David C. Williams, *A Feminist Theory of Malebashing*, 4 MICH. J. GENDER & L. 35, 110–15 (1996).

child,[29] for example, may serve to devalue the mother and child connection for the lesbian mother who is a "second parent."[30]

Linda McClain has described the problems that may result from a misuse of feminist method. In a recent article, she says:

> There has been a deep impulse in feminism, throughout its history, to engage in judgment or critical evaluation with a view to helping women. Arguably, the role of consciousness-raising as a feminist method yielding knowledge about women's lives reflects this impulse. But, as applied to other women, a stance of judgment may suggest an us/them or self/other relationship in which feminists attempt to interpret the experience and voices of other women. Particularly when differences such as race, ethnicity, and class exist, there are risks of incomprehension and misinterpretation, as well as solipsistic use of one's own experience as a measure or norm. The consequences are exacerbated when the interpreter is in a position of power (e.g., to prescribe policy agendas or to regulate the lives of the women under interpretation).[31]

The task of feminist method is to listen openly to those women who are different from us, especially the most subordinated—to hear their stories as best we can and to check our theories against the interests of those we have listened to. In addition, we must be slow to generalize, slow to build grand theory—or at least willing to revise our theories continuously in light of new knowledge.

### B. *Narrative and Stories from the Bottom*

Consciousness-raising implies dialog, the sharing of stories. My method in this article is not true consciousness-raising because I have not engaged in rap sessions or dialog groups with FTMs or other differently gendered persons. But like consciousness-raising, my method begins with the real life experiences of FTMs and other differently gendered persons. I have lurked on internet discussion lists dealing with FTM identity and immersed myself in autobiographies, personal statements, and interviews with FTMs and cross-dressers. In this article, I will offer legal theories based on the listening I have done. In addition, I will share

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29. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 12 (1988) (criticizing dominant legal doctrine for valuing separation rather than connectedness). Feminists who value maternal connections argue in favor of the maternal presumption in child custody. *See* Rena K. Uriller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 127 (1978).

30. The nonbiological second mother is rarely recognized as a parent for purposes of seeking visitation with a child she has raised jointly with the biological mother. *See, e.g.*, Curiale v. Reagan, 272 Cal. Rptr. 520 (Ct. App. 1990) (partner of biological mother has no standing to claim visitation rights); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997) (partner of adoptive mother has no standing to claim visitation rights).

31. Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 446 (1996) (footnotes omitted).

with readers some of the stories I have heard. Thus, this article embraces both the narrative and analytic traditions in legal scholarship.[32]

Narrative has been used by critical race scholars[33] as well as by feminist scholars[34] to communicate the experiences of the subordinated to others. Different scholars make different claims regarding the value of narrative scholarship. Some claim that the narrative standing alone is sufficient if it causes others to engage in paradigm shifts regarding legal positions or theories. Some claim that some narratives have more value than others. And some claim that the truth of the narratives is irrelevant to their value. Stories have power as stories whether true or not.

I wish to avoid as much of this debate as possible.[35] I make a simple claim: By listening to the stories of differently gendered persons, I learn something about their lives. I don't claim truth or higher value for these stories. I retell the ones that resonate with me, the ones that have raised my consciousness. I retell these stories for a concrete purpose: to question the current judicial understanding of sex discrimination law, an understanding that has denied meaningful existence to persons who are not at all times clearly categorized as either male or female.

The stories I have chosen for this project are the stories of women who identify as men or as masculine, including butch lesbians and FTMs. I have chosen to focus primarily on FTM experience because, in the transsexual/transgender world, their stories are the "stories from the bottom."

"Stories from the bottom" is a concept introduced by Mari Matsuda when she argued in a 1987 article:

> [T]hose who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the lib-

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32. *See* Jean C. Love, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER, RACE, & JUSTICE (forthcoming 1998).

33. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Charles R. Lawrence, III, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L.J. 627 (1986).

34. *See, e.g.*, Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); *see also* Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 38 (1991) (calling for feminist scholars to translate experience to those who are strangers to the experience); Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1688 (1990) (stating that stories are used in the hope that they "can create a bridge across gaps in experience and thereby elicit empathetic understanding").

35. For the substance of the debate, see Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

> eral promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.[36]

Professor Matsuda's claim was that "the victims of racial oppression have distinct normative insights."[37] I make a more modest claim. Victims of discrimination whose stories have not been heard will always teach us something about discrimination. Their perspective need not be more valuable or more "true" in order to teach us something. The purpose of feminist method is not to uncover truth, the view from nowhere. It is to uncover new perspectives, new views from lives and stories that have not been heard before. FTM stories can teach us something about gender discrimination—and they are stories that have been ignored, have gone unheard.

James Green, president of FTM International says:

> The FTM population suffers greatly from marginalization, even within the cultural dialog on transgender and transsexualism. We have a hard time getting published—perhaps because no one takes us seriously, perhaps because we were once women, perhaps because we are simply invisible, not as threatening as people who cut off their penises.[38]

In his book, *Female-to-Male Transsexualism*, Dr. Leslie Lothstein says:

> When transsexualism was finally included as a disorder [by the American Psychiatric Association in 1980] there was no attempt to separate male from female transsexualism. Consequently, there were no guidelines for evaluating, diagnosing, and treating female transsexualism as a distinct clinical entity. If the disorder of transsexualism was ever mentioned in the major psychology and psychiatry texts, it was either given short shrift or the focus, however brief, was on male transsexualism.[39]

Gordene Olga MacKenzie, in her book, *Transgender Nation*, reports that anthropologists have reported less on FTMs (sometimes called "amazons") as compared with MTFs. She cites Paula Gunn Allen's explanation that "fewer accounts of cross-gender women exist because women have always been considered less important than men."[40]

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36. Matsuda, *supra* note 15, at 324; *see also* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

37. Matsuda, *supra* note 15, at 326.

38. Email from Jamison Green to Pat Cain (Feb. 3, 1998) (on file with the author); *see also* C. Jacob Hale, *Consuming the Living, Dis(re)membering the Dead in the Butch/FTM Borderlands*, 4 GLQ: J. LESBIAN & GAY STUD. 311, 329–30 (1998) (noting that MTFs have more power in community organizations than FTMs, as well as greater access to the media, and explaining how current discourses on transsexuality ignore the specifics of FTM experience).

39. LESLIE MARTIN LOTHSTEIN, FEMALE-TO-MALE TRANSSEXUALISM: HISTORICAL, CLINICAL AND THEORETICAL ISSUES 4 (1983).

40. GORDENE OLGA MACKENZIE, TRANSGENDER NATION 32 (1994).

In addition, feminist legal and non-legal scholarship has tended to focus more on the MTF than on the FTM. Janice Raymond, a feminist scholar, wrote an early scathing critique of what she calls "The Transsexual Empire," arguing that with sex reassignment surgery, the medical profession has attempted to control the very definition of what it means to be a woman.[41] By relying on overly essentialized notions of femininity, doctors require men who want to become women to conform to their idea of the ideal woman.[42] Women who want to become men (FTMs) are at the margin of her analysis. They are viewed as tokens necessary to make the enterprise appear even-handed.[43]

Much feminist scholarship has focused on the meaning of "woman." Scholars have debated whether MTFs should count as women. The issue arises most frequently in the context of debates over separate space for women, raising the question of who counts as a woman for those purposes.[44] Rarely, however, do these discussions include questions about women who have become men.[45]

Feminist method is about uncovering silences. It is about learning from subordinate perspectives that have been ignored by the dominant discourse. Listening to the narratives of the differently gendered, and FTMs in particular, is feminist method. Retelling those stories in an attempt to raise consciousness and create paradigm shifts in gender discrimination law is feminist method applied.

### C. *Personal Perspective*

It has become common for feminist legal scholars to identify their personal connections to the subject matter they have chosen to address in law review articles. Feminists who write about rape often identify as rape victims[46] and feminists who write about domestic abuse often identify as abuse survivors.[47] Others tell personal stories of childbirth,[48] discrimination,[49] or family disputes,[50] when writing about related topics. Although I

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41. *See* JANICE G. RAYMOND, THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE 91–98 (1979).

42. *Id.*

43. *Id.* at 26–28.

44. *See* Boyd, *supra* note 3, at 143–48; *see also* Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label "Lesbian"?*, 8 HASTINGS WOMEN'S L.J. 1 (1997).

45. *But see* Arriola, *supra* note 44, at 27 (raising question of whether lesbian partner of woman who becomes a man can still claim the label "lesbian").

46. *See, e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); *see also* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 938 n.3 (1985) (identifying the author as a victim of a violent crime).

47. *See, e.g.*, Mahoney, *supra* note 34, at 8.

48. *See* Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989).

49. *See, e.g.*, Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 514

recognize that there are objections to these "personal footnotes,"[51] I agree and support this feminist move in legal scholarship. My position is not based on a belief that the survivor of domestic abuse or rape or other sexual violence has a special claim to truth about the subject. Rather, my position is based on an ethical concern that when one is writing about topics that are closely connected to one's personal experience, as a scholar, one is under a special responsibility to disclose the experiences or connections that might affect the author's "voice."

With respect to the topic of this article, I claim no special knowledge, no special subjective access to truth, and no special ability at objective analysis. But I do have a connection or perspective with respect to the topic of butch lesbians and FTMs, and I believe it is worth reporting. The reader can then read my analysis through whatever lens is suggested by my connection and perspective.

I identify today as a lesbian and have often identified as a butch lesbian. When I was growing up in the 1940s and 1950s, I would have given anything to be transformed from female to male. I was very religious as a child and often prayed to God that He would miraculously transform me from female to male. My prayers were very specific in that I wished to wake up with a male body. My wishes seem to me now to have had nothing to do with sexual feelings, because the longings for a male body predated any memory of sexual arousal or awareness. I was athletic and hated the limitations placed on females in the 1950s regarding athletic options. I always identified with male heroes, whether in ancient myths or in modern cowboy stories. I thought many females were silly. At the same time, I had many female friends who were tomboys and who shared my love of athletics. Not surprisingly, I experienced a profound internal crisis when my body began to take a more female shape at age ten or eleven. Because people didn't talk about such things as gender identity in those days, I never discussed any of these longings or feelings with anyone when I was growing up. Rather, I survived the experience in silence.

I embraced the concept of "women loving women" and the label "lesbian" as soon as I became aware of the existence of lesbians, which was sometime in my twenties. Despite my deep religious beliefs and experiences, I never viewed myself as a sinner because I loved women and I never felt that my religion required me to distance myself from

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(1992); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 128–29 (1987).

50. *See, e.g.*, Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. VA. L. REV. 1, 3–6 (1996) (beginning with a personal story about the naming of her own children).

51. *See, e.g.*, Mark G. Yudof, *"Tea at the Palaz of Hoon": The Human Voice in Legal Rules*, 66 TEX. L. REV. 589, 598–600 (1988) (arguing such personal accounts are often irrelevant to the author's legal scholarship).

lesbian love. To me, love has always been good, and honest love is above reproach. Such beliefs and attitudes seemed perfectly consistent with what I had learned about love in my church.[52]

I had never considered the possibility of using medical science to accomplish the goal of my unanswered prayers until I began this project. This project has made me confront that possibility. But it took very little time for me to realize that, somewhere between the ages of four and forty, I made peace with my female body and my masculine gender identity.

Given my personal perspective, my reaction upon hearing the individual stories that I uncovered in this project was to feel a deep sense of connection with the storytellers. I felt no need to distance myself in order to maintain my own identity. At the same time, I know that I have no special connection that makes FTM stories more transparent to me than to others. I may connect more easily with certain FTMs, and we may share some common life experiences, but I have learned that the differences of time, class, race, and geography are just as real here as in other narratives. Moreover, there is no meta-FTM narrative, despite the medical profession's attempt to create one for diagnostic purposes.

During my work on this project, I have been accused by some of being a voyeur, of stepping into areas that I know nothing about. Such complaints come primarily from those who believe I have no special connection with FTM experience, some of whom even suggest that I am not sufficiently "butch" to claim that label. These charges, although disturbing at a number of levels, have helped to raise my own consciousness about the dangers of identity politics and of legal analysis based on identity categories. Although I firmly believe in a subject's right to self identification, I am also committed to projects that deconstruct fixed or rigid categories, even those embraced by the very subjects whose life experiences I honor and respect. As a listener in this project, therefore, I have endeavored to be open-minded and understanding, while at the same time questioning the basic premise of bipolar sex identity upon which FTM identity and narrative is based.

## III. WHAT DOES IT MEAN TO BE DIFFERENTLY GENDERED?

In law, as well as in other disciplines, the term "sex" has come to mean biological sex and "gender" has come to mean that which is socially constructed. Thus, one's sex is either male or female, and one's

52. I grew up in the Southern Baptist Church. I can't explain why I, unlike other Southern Baptists, developed a sense of love that included same-sex love. I always believed in the power of faith to move mountains and I always believed that honesty was the greatest virtue of all. Being true to myself, including being honest about the love I felt for women, was absolutely consistent with my own religious principles as I developed them while an active member of the First Baptist Chruch in my home town.

gender may be either masculine or feminine. This binary classification system is much too constrained to embrace all of reality. Some people are intersexed in that they combine both male and female biological traits. Sometimes the balance between male and female is sufficiently even that we cannot tell for certain whether a person is one or the other. Nonetheless, such intersexed people are assigned a single sex at birth.[53] Thus, they begin their lives in the assigned sex role with expectations that gender will conform to the assigned sex. Later in life, it may turn out that some such persons develop secondary sex characteristics of the sex opposite to the one assigned. At that time, reassignment will be difficult, although surgical intervention can sometimes help.

Some people begin their lives in one biological sex (e.g., female), but with a strong gender identity of the opposite sex (e.g., male or masculine). Many butch lesbians fit within this category,[54] as do some mannish heterosexual women. With the help of modern medicine, some of these differently gendered people elect to go through treatments that will more nearly align their bodies (i.e., their biological sex) with their gender identity.

Some butch lesbians spend a lot of time working on their bodies to become more masculine in appearance. They work out at gyms and health clubs. Some even elect breast reduction surgery, often for good medical reasons, but buttressed by a desire to appear more butch or masculine.[55] FTMs also work on their bodies and have surgeries. Some start with breast reduction and end up with double mastectomies. Most FTMs have hormone therapy treatments. That is, they take testosterone on a regular basis. Some individuals who identify as FTM avoid taking hor-

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53. *See* discussion *infra* Parts IV.A.3, IV.B.2.b (presenting the stories of Thomas Hall and Lynn Edward Harris).

54. The term "butch" is more fluid than my use of it in the text might suggest. Within the lesbian community, butch and femme are terms that describe behaviors of individuals as well as relationships between two women. Although some might perceive the labels as fixed (i.e., a butch is always a butch), others perceive the labels as relative (e.g., in every couple one person is more butch than the other and a woman who is butch in one relationship might be perceived as femme in another relationship). For purposes of this article, my use of the term "butch" is closest in meaning to that offered by Gayle Rubin:

> *Butch* is the lesbian vernacular term for women who are more comfortable with masculine gender codes, styles, or identities than with feminine ones. The term encompasses individuals with a broad range of investments in "masculinity." It includes, for example, women who are not at all interested in male gender identities, but who use traits associated with masculinity to signal their lesbianism or to communicate their desire to engage in the kinds of active or initiatory sexual behaviors that in this society are allowed or expected from men.

Gayle Rubin, *Of Catamites and Kings: Reflections on Butch, Gender, and Boundaries*, *in* THE PERSISTENT DESIRE: A FEMME-BUTCH READER, *supra* note 2, at 466, 467.

55. For example, short of sex reassignment surgery, some butch lesbians will elect breast reduction surgery so that their bodies become more aligned with their gender identities. *See* Marj Plumb, *Butch Identity, Breast Reduction, and the Chicago Cubs*, GIRLFRIENDS 25, 27 (March 1998), *excerpted from* THE LESBIAN HEALTH BOOK: CARING FOR OURSELVES (Jocelyn White & Marissa C. Martinez, eds. 1997).

mones because they fear the consequences of taking a powerful drug like testosterone, which changes more than appearance.

Butch lesbians differ from FTMs in that they identify as women, both privately and publicly, despite the fact that they embrace some attributes of masculinity. This category would include persons identified as female at birth or later.[56]

Many scholars identify transsexual persons as those who desire surgery in order to change their physical bodies so that the body will more closely align with gender identity.[57] Thus, the desire for sex reassignment surgery has come to be understood as the key factor that divides true transsexuals from other transgendered persons. The focus on surgery or the desire for surgery is troubling, especially as a defining line for FTMs. Breast reductions or mastectomies are surgical interventions, but are not solely thought of as sex reassignment surgeries because they are available to women for other purposes.[58] Many, perhaps most, FTMs decline to purchase genital reconstructive surgeries.[59] Thus, for many, hormone treatment is the primary medical intervention.

In this article, my focus is on women who were identified as female at birth, but who claim some degree of masculine identification, regard-

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56. I include in the category of masculine or butch women, persons who may have transitioned to a female body through sex reassignment surgery. I certainly do not intend to exclude MTF transsexuals from the category "woman" or the category "lesbian" as certain feminist organizations have tried to do. *See, e.g.*, Boyd, *supra* note 3, at 143–45 (discussing exclusion of transsexual women from Michigan Womyn's Music Festival).

57. *See, e.g.*, BERNICE L. HAUSMAN, CHANGING SEX: TRANSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER 72–109 (1995) (examining case studies); Ken Morris & Candace Hellen Brown, *The Alan Lucill Hart Story*, 6 TNT: TRANSSEXUAL NEWS TELEGRAPH 3, 14 (1996) (stating that "[i]t is not surgery which defines a transsexual, but the internal visualization and experience of the body as being of the opposite sex" and the resulting "desire to bring the body into conformity with the internal image").

58. Breast surgery is included as genital surgery in the Standards of Care first published by the Harry Benjamin International Gender Dysphoria Association. *See* HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION, INC., STANDARDS OF CARE: THE HORMONAL AND SURGICAL SEX REASSIGNMENT OF GENDER DYSPHORIC PERSONS (1990) [hereinafter BENJAMIN STANDARDS], *reprinted in* GENDER BLENDING 505 (Bonnie Bullough et al. eds., 1997). The standards require a second opinion before surgery is authorized. *Id.* § 4.7.5 Standard 7, *reprinted in* GENDER BLENDING, at 515. No second opinion is required for hormone therapy. Before genital sex reassignment is authorized, the patient must live full-time in the social role of the genetically opposite sex for a year. *Id.* § 4.9.1 Standard 9, *reprinted in* GENDER BLENDING, at 515. No such 12 month requirement precedes breast surgery.

59. *See* HOLLY DEVOR, FTM: FEMALE-TO-MALE TRANSSEXUALS IN SOCIETY 447 (1997). There are several reasons why FTMs are more likely than MTFs to decline genital reconstructive surgery. First, FTMs are generally successful in changing their gender attribution from female to male without surgery. Apparently individuals feel less compelled to have surgery once they are recognized as members of the new gender. In addition, the quality of phalloplasty surgery in terms of both aesthetics and function is not high. Vaginoplasties are much more effective. Finally, the cost of phalloplasties is much greater, sometimes estimated as high as $150,000. *See generally* CLAUDINE GRIGGS, S/HE: CHANGING SEX AND CHANGING CLOTHES 81–86 (1998) (discussing the relative values of surgery).

less of whether they take extraordinary steps to align their bodies with masculinity. Since I rely on self-identification, neither surgery nor hormone therapy are prerequisites to claiming the FTM label. I will not generally distinguish between pre- and post-op transsexuals, although where the fact of surgery is relevant, I will mention it. I sometimes identify FTMs as in transition or fully transitioned. Full transition does not depend on the amount of surgery the FTM has completed. Again, I rely on self-descriptions, so that a subject who claims to be fully transitioned may or may not have had any surgery. Furthermore, my use of the category FTM probably includes persons that others would label as transgendered rather than transsexual.

Passing women present an analytical challenge as they are not easily assigned to either the category FTM or butch lesbian. Passing women were women who lived as men before there was any possibility for surgical intervention. Some of these women might well identify as FTM today, but there is no way to know for sure. Both FTMs and butch lesbians have claimed many of these women as part of their historical heritage.[60] I include some of their stories in this article because, in whatever category they fall, they certainly qualify as "differently gendered" and their stories are "stories from the bottom."

I also include in my "gender garden" persons of either biological sex who embrace both masculine and feminine gender identities. My term for describing such people is that they are "radically androgynous." On a gender continuum from masculine to feminine, they are not necessarily at the center, the usual location under traditional notions of androgyny. Such traditional notions of androgyny conjure up images of unisex individuals, of persons who are neither male nor female. Such a notion is what gave androgyny a bad name in the early stages of the second wave of feminism.[61] My concept of androgyny as a radical concept is intended to embrace both ends of my imaginary continuum of gender. A person's gender identity may be any place on the scale at any given time. Some people may, throughout their lives, hover around one end of the scale. Others may jump all over the place, sometimes expressing their masculine identities and sometimes expressing their feminine ones.[62]

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60. The slide show "She Even Chewed Tobacco" focuses on a number of such passing women who have been claimed by the lesbian community and by the FTM community. For a textual description of the show, see The San Francisco Lesbian and Gay History Project, *"She Even Chewed Tobacco": A Pictorial Narrative of Passing Women in America*, *in* HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 183 (Martin Duberman et al. eds., 1989).

61. *But see generally* CAROLYN G. HEILBRUN, TOWARD A RECOGNITION OF ANDROGYNY (1973) (presenting a feminist argument in favor of using the notion of androgyny to free individual human development from the limits imposed by polarized concepts of sex and gender).

62. The radically androgynous would include the "men in skirts" that Mary Anne Case is concerned about. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995). A good contemporary example of a male who sometimes expresses female identity is gender-bender Dennis

## IV. STORIES FROM THE GENDER GARDEN

### A. *Stories from History*

Throughout history there have been stories, real and fictional, of women who have chosen to live as men, to wear men's clothing, to "pass." Sometimes these women passed for short periods of time and sometimes their biological sex was only discovered after death.[63] Such stories include the lives of so-called transvestite Saints,[64] the lives of women who donned male clothing and fought for their countries as soldiers or sailors,[65] and the lives of women who chose male identities to escape marriage or other female destinies.[66] Although the category transsexual did not exist during these periods, some of these women undoubtedly would have classified themselves as FTMs if they had lived today.

#### 1. Balkan "Sworn Virgins"

In the mountains of North Albania, close to the Yugoslavian border of Montenegro, tribal societies continue to exist in which there are strict hierarchies between men and women.[67] Women have few rights independent of their fathers and husbands. A widow who has no surviving son, for example, would not be allowed to maintain her own home. To

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Rodman of the Chicago Bulls. An example of a female who sometimes expresses male identity is k.d. lang.

63. *See, e.g.*, JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 232 (rev. ed. 1992) (telling the story of Murray Hall, a woman who posed as a man, married twice, was active in New York City politics, and whose true sex was not discovered until she died of breast cancer); LOUIS SULLIVAN, FROM FEMALE TO MALE: THE LIFE OF JACK BEE GARLAND 8 (1990) (describing the headlines of the San Francisco Chronicle as proclaiming "'Jack Bee' Was Woman" in 1936 when Garland died in a San Francisco hospital).

64. Joan of Arc is the most familiar of these Saints. But there are numerous others, including Saint Thecla, who was a follower of Paul; Saint Margaret, who dressed as a man to escape her arranged marriage; and Saint Uncumber who, when she prayed to be saved from marriage, became physically able to grow a beard. *See* RUDOLF M. DEKKER & LOTTE C. VAN DE POL, THE TRADITION OF FEMALE TRANSVESTISM IN EARLY MODERN EUROPE 45–46 (1989). For a brief description of 34 female Saints who dressed or passed as men from the second to fifteenth centuries, see VALERIE R. HOTCHKISS, CLOTHES MAKE THE MAN: FEMALE CROSS DRESSING IN MEDIEVAL EUROPE 131–41 (1996).

65. *See* DEKKER & VAN DE POL, *supra* note 64. Their research uncovered 119 cases of females who attempted to pass as men during the seventeenth and eighteenth centuries in the Netherlands. Many of these cases were discovered because the women had attempted to pass as soldiers or sailors and their true sex was identified. *Id.*; *see also* KATZ, *supra* note 63, at 212–14 (telling the story of Deborah Sampson, who dressed as a man and fought in the Revolutionary War).

66. *See, e.g.*, CATALINA DE ERAUSO, LIEUTENANT NUN: MEMOIR OF A BASQUE TRANSVESTITE IN THE NEW WORLD (Michele Stepto & Gabriel Stepto trans., Beacon Press 1996) (telling the story of Lieutentant Nun, born in the Basque town of San Sebastian in 1585, who escaped the convent at age 14 by donning male attire and sailing to the New World).

67. DEKKER & VAN DE POL, *supra* note 64, at 42; Mildred Dickemann, *The Balkan Sworn Virgin: A Traditional European Transperson*, *in* GENDER BLENDING, *supra* note 58, at 248; Rene Gremaux, *Woman Becomes Man in the Balkans*, *in* THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY 241–46 (Gilbert Herdt ed., 1994).

escape this fate, a daughter in a family with no sons might choose to become the "man" of the family. Alternatively, if a family had no male heirs, the parents or grandparent might declare that a daughter too young to make her own declaration would henceforth be raised as a boy. From that point forward, the girl child would dress as a man, carry weapons, and perform the ritual acts reserved for men. In exchange for this recognition of male privilege, the girl child would vow to remain unmarried and chaste for the rest of her life.

Mikas Milicev Karadzic, by all accounts, was born female in the late nineteenth century in the Balkans.[68] When she was quite young, Milica (her female name) lost her father. He was killed in battle and her mother, left with no male in the house, dressed Milica in male clothes and renamed her Mikas. Mikas adopted his new gender identity readily and grew into a man, acted as head of the household, and performed the ritual and ceremonial acts assigned to men. He even voted as a man and was accepted in his male role by the chieftains of the surrounding clans. Although it appears that the male role was thrust upon him, probably more by the grieving grandmother than the mother, Mikas apparently grew into the role and refused to be known as female ever again. He became a soldier, was referred to either as husband's brother or elderly man, and was buried as a man in male attire. Regarding physical attributes, Mikas claimed to have menstruated for a short period at age 13, but never again. Women who cared for Mikas in his old age said he had "ill-developed breasts." He had no intimate relationships, although it is said that he used to talk to other men about his lust for women.

Rene Gremaux has uncovered the case histories of 120 such women who lived as men in the Balkans.[69] They were not true "passing women" because they remained in their homes where the clanspeople knew that they were born female. Yet, either by choice or by force of circumstance, they took on the male role with the approval of male elders, usually at puberty, and they remained in that role throughout their lives, even after the necessity for being male had ended (e.g., after the widowed mother had died).

2. Maria van Antwerpen

Maria van Antwerpen was born in Breda in 1719 and orphaned at the age of 12.[70] She worked as a maidservant for a while, and then in 1746 enlisted as a soldier under the name of Jan van Ant. One year later, she officially married a woman who was not aware of Maria's true sex. While stationed with her army unit in Breda in 1751, Maria was recog-

68. Mikas Milicev Karadzic's story is taken exclusively from Gremaux, *supra* note 67, at 246–53.

69. *Id.* at 242 (providing case histories for four of these individuals).

70. Maria van Antwerpen's story is taken exclusively from DEKKER & VAN DE POL, *supra* note 64, at 3–4 and other scattered portions of their work.

nized by a previous acquaintance and, thus, her disguise was discovered. She was subsequently arrested and sentenced to a period of exile. Ten years later, she again disguised herself as a man and married another woman. She was arrested again in 1769. From the records of her arrests and trials, we learn of her reasons for her decision to live as a man.

Maria argued that "God, Nature, and Fate had predestined her cross-dressing."[71] She claimed that she should have been and was expected to be the seventh son of her parents. In her own words: "I take this as rule, that no one can escape his predetermined fate. It is impossible to control one's first passions."[72] She said she was not like any other woman and therefore it was best to dress in men's clothing. She also said she "was in appearance a woman, but in nature a man."[73]

Many of these statements sound much like the statements of modern FTM transsexuals. It is almost as though she was crying out, "I am a man trapped in the body of a woman." In her autobiography, she explained her feelings as follows: "It often made me wrathful that Mother Nature treated me with so little compassion against my inclinations and the passions of my heart."[74] It is reported that even when she dressed as a woman, she wore male undergarments. She also reported that as a teenager a "shaft shot out of her body"[75] when she menstruated, thereby claiming a biological cause for her actions. She was medically examined and found to be female.

3. Thomas or Thomasina Hall

The story of Thomas or Thomasina Hall is derived from court records in 1629 Virginia.[76] Hall was brought before the court because he/she sometimes dressed as a woman and sometimes as a man. Although never charged with a crime, Hall had been reported to the authorities because villagers were confused as to whether Hall was a he or a she. Hall was born female according to the English records of her birth. She moved to the New World as an indentured servant in male attire, claiming male identity. But after settling in Virginia, he sometimes reverted to female clothes and female identity. The women appointed by the court to determine whether Hall was female searched him and found him to be male. Others were not convinced, so Hall was inspected again—this time by

71. *Id.* at 25.
72. *Id.* at 26.
73. *Id.*
74. *Id.* at 68.
75. *Id.* at 67.
76. Thomas or Thomasina Hall's story is taken from MARY BETH NORTON, FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY 183–88 (1996), and Hasan Shafiqullah, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN'S L.J. 195, 198 (1997).

men and women. The women agreed again that Hall was male, but the men were divided.

The court ultimately appears to have accepted Hall's self-description as male and agreed to refer to him as "he." Yet, at the same time, the court pronounced him both male and female and ordered him to wear female headgear and an apron over his male attire as, one might surmise, an outward expression of his dual status. It is unfortunate that we do not have any verified first person accounts by Hall himself. It is also unfortunate that court records were burned during the Civil War, making it impossible to further trace Hall's history. It seems that his sex may have been physically ambiguous and that his gender was mixed.

The time and effort the community committed to determining the correct category for Hall—male or female—is consistent with society's reluctance to accept the possibility of both categories in the same person. Their actions reflect their understanding that male and female are polar extremes—for both sex and gender. Hall could be one or the other but not both. The amazing ending to the story is that the court's action is consistent with a recognition that Hall was both. It is not clear that the community embraced the court's determination, but it does seem that a determination by the court was needed to end the conflict. Thus, there was a legal solution to the dilemma and Hall was legally assigned to a special category that had not existed before.

4. Passing Women

Jack Bee Garland died in 1936 after living as a man for 40 years.[77] Garland had been born in San Francisco in 1869 as Elvira Virginia Mugarrieta, the daughter of San Francisco's first Mexican consul. Her sister reported that Garland had dressed as a man for numerous reasons including: creating the opportunity to visit the Spanish-American war front in the Philippines in 1899, because it fit her/his style, and because it enabled Garland to help the down-and-outers on the streets of San Francisco. Before moving to San Francisco and passing as a man, Garland lived in Stockton and used the name Babe Bean. In Stockton, her sex was publicly questioned and she seems to have intentionally maintained an ambiguous gender identity, straddling male and female. She was often referred to in the local press as a woman in male attire, but the newspaper also maintained the mystery by continuing to question whether she was male or female.[78]

There is no evidence that Garland passed as a man to enable him to maintain sexual or romantic relationships with women. His biographer, Louis Sullivan, claims Garland was a true FTM, who embraced a mas-

77. Jack Bee Garland's story is taken exclusively from SULLIVAN, *supra* note 63.

78. *Id.* at 31 (quoting from the local newspaper that "[t]he mystery is still unsolved as to whether 'Babe' Bean is a boy or girl, a man or a woman").

culine identity "in order to be a man among men."[79] Sullivan quotes from Garland's memoirs:

> Many have thought it strange that I do not care to mingle with women of my own age, and seem partial to men's company. Well, is it not natural that I should prefer the companionship of men? I am never happy nor contented unless with a few of "the boys." They talk and act naturally—without the conceit or affectations so often practiced in the drawing-rooms. Could women see men as I have, they would love them all.[80]

Dorothy Lucille Tipton was born female in 1914.[81] In the early 1930s, she began the transformation process which established her new identity as Billy Tipton, jazz musician. Billy died in 1989 at the age of 74. His three adopted sons and several of his five wives expressed astonishment at the revelation of Tipton's biological sex after death. Tipton never had surgery or hormone treatment, but nonetheless passed as a male for over forty years, a feat all the more remarkable given his lifetime of travelling in close quarters with other musicians. He bound his chest, used a prosthesis, and claimed his privacy as protection against discovery. His mother stayed in touch with him until her death in 1971, but never revealed Tipton's gender to his wives or children. Because Tipton left us no personal insight into his choices, we are left to guess the reasons. Some surmise that the explanation lies in the fact that maleness was a prerequisite for the vocation that Billy chose, jazz musician. At the same time, Billy rejected jobs that would have led to greater renown in the music world, apparently concerned that too much fame would subject him to the risk of being discovered female. Late in life, when he needed medical care, which he also rejected for fear of discovery, he explained to visiting cousins that he could not be truthful about his sex because transsexualism and cross-dressing were against the law and he feared arrest. Billy Tipton lived in constant fear of being "found out." He confided to his cousin Madeline, " Some people might think I'm a freak or a hermaphrodite. I'm not. I'm a normal person. This has been my choice."[82]

Unlike Jack Bee Garland, Billy Tipton had sexual relationships with women, several of whom he "married." Although Billy's first involvement was with a woman whom many labeled lesbian, Billy's lifetime choice to live as a man did not seem to be motivated primarily by a desire to be sexually involved with women. In fact, according to his last wife, Kitty, she and Billy had no intimate sexual relationship. Nonethe-

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79. *Id.* at 4.

80. *Id.*

81. A recently published full-length biography of Billy Tipton tells the full story of this remarkable life. *See* DIANE WOOD MIDDLEBROOK, SUITS ME: THE DOUBLE LIFE OF BILLY TIPTON (1998).

82. *Id.* at 278.

less they were married for 18 years. They finally divorced over problems they had in raising their three adopted sons. After a major argument, Billy took the side of the children against his wife, and moved out of the family home with his sons.[83] Playing husband and father were central aspects of Billy's overall identity as male. The roles do not appear to be a cover for a lesbian relationship.

By contrast, many passing women live as men in large part to enable pursuit of romantic or sexual relationships with other women. Alberta Lucille Hart appears to have been such a woman. Her story is reported in some detail by a Portland, Oregon psychiatrist whom she consulted in 1918.[84] The story includes a number of incidents of deep emotional attachments to other females as she was growing up, coupled with fairly explicit "daydreams" about being with these women as a husband or boyfriend. She was an intelligent and industrious student, who went to Stanford medical school and became a doctor. The psychiatrist diagnosed her as homosexual, and for a while engaged in treatments (e.g., hypnosis) aimed at correcting that "problem." The patient, however, became concerned that any such treatment might diminish her masculine identity. "She had an utter loathing of the female type of mind."[85]

The patient's solution was to ask for her doctor's assistance in enabling her to live as a man, which was in conformity with her true nature. The doctor appears to have required more than psychological evidence of masculinity before agreeing to this proposal. He physically examined her and found "deviations sufficiently marked to attract attention."[86] He noted an enlarged clitoris, but gave no details. He also found that her breasts and hips were clearly female, but smaller than normal. Hart requested surgical removal of her uterus, in part to help her pass as male since menstruation was occurring. A hysterectomy was performed, she cut her hair, and assumed a male identity. She married a woman and practiced her profession, medicine, in a neighboring state. The psychiatrist concluded in his notes of the case:

> If society will but let her alone, she will fill her niche in the world and leave it better for her bravery in meeting the issue on the merits of the case as best she knew. Instead of criticism and hounding, she needs and deserves the respect and sympathy of society, which is responsible for her existence as she is.[87]

If being transsexual means desiring surgery to help one's gender identity more readily conform to one's body, then Hart should qualify.

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83. *Id.* at 252–59.

84. Alberta Lucille Hart's story is taken exclusively from Allen J. Gilbert, *Homosexuality and its Treatment*, 52 J. NERVOUS & MENTAL DISEASE 297 (1920), *reprinted in* KATZ, *supra* note 63, at 258.

85. *Id.* at 275.

86. *Id.*

87. *Id.* at 277.

The requested surgery, a hysterectomy, was requested for purposes of enabling her body to conform to her own idea of herself as male. But Hart also requested the surgery to assure that she would not have children. Somewhere along the line, someone had convinced her that her relations with women were deviant and she seems to have thought this judgment meant she should not have children. Whether Hart would have been a transsexual man or a butch lesbian in today's culture is unclear, but she was clearly differently gendered in her own time. Her psychiatrist seems to have been won over by her strength of character and will. Living as a man was her choice and it seemed the best solution, given her determination to practice medicine and to be intimate with women.

B. *Modern Stories*

The stories that follow are stories told by FTMs in their own words, either in autobiographies, or in articles, or as reported by social scientists who have interviewed subjects. I have grouped the stories according to some common themes that emerge.

1. "I am biologically male."

In the 1950s transsexualism gained its first modern hero in the form of Christine Jorgensen, a man who became a woman.[88] Others followed and their autobiographies engaged audiences around the world. Jan Morris, who was professional writer, wrote her own autobiography when she became a woman.[89] The story of Renée Richards,[90] a male to female who gained fame from her legal battle to play women's tennis, is probably familiar to many Americans, especially since the story was made into a made-for-TV movie, *Second Serve*.[91] Autobiographies by FTMs are less well known and less common.

a. *The Story of Mario Martino*

The earliest first person full-length autobiography appears to be that of Mario Martino, published in 1977 under the title *Emergence*.[92] The autobiography contains no specific dates, but from the story I conclude that Mario, who grew up as Marie, was probably reaching puberty at about the time the Jorgensen story broke in 1953. That would make Mario about 55 years old if he is alive today.

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88. *See* CHRISTINE JORGENSEN, CHRISTINE JORGENSEN REVEALS (J Records 1953) (sound recording); *see also* CHRISTINE JORGENSEN, CHRISTINE JORGENSEN: A PERSONAL AUTOBIOGRAPHY (1968).

89. JAN MORRIS, CONUNDRUM (1974).

90. RENÉE RICHARDS, SECOND SERVE: THE RENÉE RICHARDS STORY (1983).

91. SECOND SERVE (Lorimar-Telepictures 1986).

92. MARIO MARTINO WITH HARRIETT, EMERGENCE: A TRANSSEXUAL AUTOBIOGRAPHY (1977). Mario's story is taken exclusively from this source.

Marie was raised Catholic in an Italian-American family. She went to a convent school where she fell in love with and had some minor physical relationships with other girls—which of course were discovered by the nuns and for which she was often expelled. She trained to be a nurse at a Catholic hospital and, as a novitiate, was known as Sister Mary Dominick. She left the convent at age 25, but continued her nursing career and her relationships with women. She had never been with a man.

Marie claimed that she didn't know until age nine that she wasn't a boy. Shortly after she left the convent she and some friends at the hospital were running urine tests on themselves to check hormone levels. Marie's test was consistent with the hormones of a seventeen-year-old boy. She was elated. Her sense of herself as male had been confirmed by physical evidence.

She writes in the preface to her book:

> My life was a series of distorted mirrors. I saw myself in their crazy reflections false to the image I had of myself. *I was a boy!* I felt like one, I dressed like one, I fought like one. Later, I was to love like one.
>
> Unless you have actually experienced transsexualism, you cannot conceive of the trauma of being cast in the wrong body. It is the imprisonment of body and of soul . . . .[93]

The most important event in her life as Marie (other than the discovery that her urine test could have been mistaken for a male's) was her relationship with Becky. While Becky maintained initial reservations against Marie's decision to become Mario, they overcame these difficulties. Becky, also a nurse, attended Mario during his recuperation. The most important event in Mario's life was his marriage to Becky.

The marriage was not an easy event to plan. They wanted to be married in the Church by a priest and they found one who was supportive. Mario's birth certificate had been changed to male and his nursing license had been changed as well. But now he had to deal with his hometown priest in order to acquire his baptismal certificate. Here the trouble began. The hometown priest refused to cooperate, the supportive priest could not be available at a later date, and the new priest who initially agreed to do the marriage did not know Mario's story. When a co-worker called the new priest and explained Mario's situation, the new priest telephoned Mario, called him a "despicable thing" who submitted to surgery for "immoral purposes," and cancelled the wedding ceremony.[94] With the help of friends, a Methodist minister agreed to substitute. Mario says of himself now: "Legally male, a happily married husband, I ask only to be accepted now as an average man."[95]

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93. *Id.* at xi–xii.
94. *Id.* at 227.
95. *Id.* at xi.

Marie's life was filled with disasters and, once she was in transition, her status as an outcast brought even more disasters. Even though he was a good nurse, Mario was ostracized by the other nurses as he was going through the process of becoming Mario. Mario's co-workers had a harder time dealing with the transition period than with the final outcome. They could not deal with that "in between" stage of his being part male and part female. And yet, for Mario, that had been the problem all along: being part male and part female. The transition made Mario whole, bringing his maleness to the fore.

b. *The Story of Lynn Edward Harris*

Lynn Edward Harris was born in California with combined male and female sex characteristics.[96] At birth, the genitalia appeared ambiguous, causing her parents and doctor to arbitrarily designate her as female. Outward manifestations of male characteristics, including the development of a budding penis at age five, a lowering of the voice between ages eleven and thirteen, and the need to shave daily by age fifteen, as well as internal questions of gender identity prompted Lynn to seek answers from the medical profession—but a doctor failed to even acknowledge her questions. Her mother refused to recognize the problem and insisted it was all mental. At age twenty-three, Lynn checked herself into a hospital for analysis and the congenital anomaly was discovered. Because she had been raised as a woman, Lynn continued to adopt female attire—but it never felt right to her. At the same time, she had no interest in going through surgery to change her body.

Finally, a friend suggested that she simply embrace a male identity. To do so, she began dressing as a man and stopped shaving. Then she requested a legal name change, changing her middle name to the male name "Edward." She also requested a new birth certificate that would show her sex as male. Harris made these requests in a court petition, fully aware of the California statute that required her to undergo surgical treatment before a new birth certificate would be issued indicating a new sex.[97] The California statute did not contemplate, as some other states do, that the sex may have been designated incorrectly at birth.[98]

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96. Lynn Edward Harris's story is taken exclusively from Lynn Edward Harris, *A Legal Path of Androgyny*, *in* GENDER BLENDING, *supra* note 58, at 495.

97. California's Health and Safety Code states:

> Whenever a person born in this state has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex, a new birth certificate may be prepared for the person reflecting the change of gender and any change of name accomplished by an order of a court of this state . . . .

CAL. HEALTH & SAFETY CODE § 103425 (West 1996).

98. For example, Hawaii expressly addresses the problem of incorrect designation by allowing a change in sex designation on a birth certificate if:

> (4) Upon receipt of an affidavit of a physician that the physician has examined the birth registrant and has determined the following:

Harris argued before the court that her sex was male and that the birth certificate was a fraud. She/he requested a legal remedy for the "ambiguity, lack of continuity and presumed fraudulence associated with my present gender status."[99] The petition was granted although it is unclear from Harris's account whether the judge ruled only on the name change or both the name change and sex change.

At any rate, presuming that he now had the power of the court decision on his side, Harris wrote to the Department of Vital Statistics, requesting a new birth certificate. The Department of Vital Statistics sent back a "new" certificate with the "new" name, but the sex indicated on the certificate remained female. When Harris complained, the Department sent a copy of the California statute. Harris countered with the argument that the statute only applied in cases where a person changed from one sex to the opposite sex and since he was both male and female he could not identify what "opposite sex" could mean in his case. Thus, the statute simply did not apply to him. Furthermore, there was no general requirement that one go through surgery in order to correct the sex on a birth certificate. Finally the Department relented and issued a new certificate indicating that his sex was male.

Harris describes his legal victory as follows:

> Justice was done. To win as I did, having both the facts and the law on my side, was an ultimate victory . . . . The court in its wisdom had profoundly empowered and enabled me to actualize my potential and destiny with authenticity as I, a true hermaphrodite, am living life and perceiving it.[100]

It is easy to understand the sense of victory in having one's claimed identity recognized by a court without having to jump through the surgery hoop required by the statute. But one can only ask: How much of a victory is it and how authentic is it to live within the category "male" if one is really both male and female?

### c. *Other Stories*

Holly Devor's recent study of FTMs uncovered some cases of individuals who had been designated female, but who, when surgery was finally performed, turned out to have some male characteristics in their reproductive systems.[101] Devor questions whether it is appropriate to call

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> (A) The birth registrant's sex designation was entered incorrectly on the birth registrant's birth certificate; or
>
> (B) The birth registrant has had a sex change operation and the sex designation on the birth registrant's birth certificate is no longer correct; provided that the director of health may further investigate and require additional information that the director deems necessary. . . .

HAW. REV. STAT. § 338-17.7(a)(4)(A), (B) (1993).

99. Harris, *supra* note 96, at 499.

100. *Id.* at 502.

101. *See* DEVOR, *supra* note 59, at 405.

these persons FTMs or whether they belong in a different sex/gender category altogether.[102]

Aaron, one of her subjects, calls his sex ambiguous, and says of FTMs: "How can they stop being female if they never been? They can stop looking female. They can stop acting female . . . . But they can't stop being something they've never been."[103] Peter, another of her subjects, also denies ever having been female:

> I don't think that I ever thought that I truly was [female] but, at some point in time, I said you're not even going to get to call me this. . . . I'm getting to the point where I hate the word "transsexual." It's a label, and I don't like it. I also don't like "F-to-M." It implies that there really was something else that I don't really feel . . . .[104]

2. "I am a man, not a lesbian."

Many FTMs have lived some part of their lives as lesbians, even embracing the label lesbian. Since FTMs are usually attracted to women, they have much in common with lesbians and find lesbian communities offer some solace and opportunity to be who they are. Nonetheless, FTMs maintain their differences from lesbians, sometimes to the verge of appearing homophobic.

At a meeting of FTM International,[105] a member explains how he chose to tell his father about his transition: "I told him, 'The good news is, I'm not a lesbian.'"[106]

Other accounts echo this sense of difference.

> When I got involved with gay women and found out how frigging different I was it was obvious. Up until that point I thought that other gay females were the same as me, they wanted to be male. And when I found out that was not true that no matter how masculine they acted, they had female identities, I realized I didn't quite fit in here, but I fit in closer here than I ever had.[107]

> I knew about lesbians but it just didn't occur to me that's what it was. . . . What I knew about lesbians was that two women can be together and it's okay if they are lesbian. . . . It was something they did on the coast in the big cities, more liberal people did. I just didn't consider myself that liberal, that open minded . . . . To get into being

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102. *Id.*

103. *Id.* at 449 (statement of Aaron).

104. *Id.* at 448 (first and second alterations in original) (statement of Peter).

105. FTM International is a San-Francisco based education and support group. The group includes around a thousand members who range from FTMs who are only taking hormones to those who have completely transitioned with the help of surgery. *See* FTM International Homepage (visited Nov. 21, 1998) <http://www.ftm-intl.org>.

106. David Tuller, *A Self-Made Man*, S.F. CHRON., Sept. 21, 1997, at Z1.

107. GENDER BLENDING, *supra* note 58, at 96 (statement of Aaron).

> a lesbian, like, you have to march for things and you gotta go to caucuses, you gotta hate men, you gotta dress butch, and you gotta get in to all that stuff, and I didn't want to do that. I didn't want to get into all that stuff.[108]

James Green, a fully transitioned FTM and president of FTM International, describes his relationship with the lesbian community during the time he was still a woman: "I was excluded from lesbian events even before I started the transition. I was just too male—not butch but male. I crossed some line somehow, and everyone, the other women, felt that there were things about me, despite my female body, that were just not female."[109]

Another transitioned FTM says:

> I thought, Well, maybe I'm a lesbian. Could be—I know I'm attracted to women. I went to consciousness-raising meetings, and I'd listen and feel like a fraud. One girl said, "What makes each of us feel like a real woman?" And while they went around the room answering, I thought, Nothing—absolutely nothing on earth makes me feel like a woman.
>
> I'm just a plain old heterosexual man. . . . I'm not a professional transsexual. I don't think of myself as a transsexual anymore. I was one, I made that transition, now I'm just a man.[110]

Tony Barreto-Neto stated: "People may have seen me as a lesbian, but, in my mind, I was a straight, heterosexual man."[111]

In a letter to Dr. Lothstein, Barbara L. writes:

> I was asked to leave college because they thought I was gay. I never even became involved with anyone, but because I was attracted to women, they believed I was. I know I am not a latent homosexual or a transvestite, but a transsexual. I feel male and I am.[112]

In his autobiography, *Emergence*, Mario Martino tells of his relationship with Becky, pre-transition, when Mario was Marie. Love between two women was initially difficult for Becky, probably in large part due to her Catholic upbringing. Although Marie insists that she always thought of herself as male, this claim became stronger in response to Becky's misgivings about lesbianism. Marie says to Becky: "[Y]ou and I are not lesbians. We relate as man to woman, woman to man."[113] Then

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108. *Id.* at 95 (alterations in original) (statement of Stan).

109. Amy Bloom, *The Body Lies*, NEW YORKER, July 18, 1994, at 41.

110. *Id.* at 49 (quoting "Michael," a transitioned FTM).

111. Paulo Lima, *Cop Beats Sex-Change Backlash*, TAMPA TRIB., Jan. 20, 1996, at 1 (reporting on Tony Barreto-Neto, a fully transitioned FTM who is a sheriff's deputy in Hillsborough County, Florida).

112. LOTHSTEIN, *supra* note 39, at 1.

113. *Id.* at 132.

Marie further rationalizes: "Any resemblance to lesbianism on our part was due to my lack of the proper organs. Never did I use my vagina during lovemaking—always I attached and wore my false penis."[114]

The rejection of the lesbian label can be explained in several different ways. It would not, for example, be in the least surprising to discover that society's homophobic attitudes have permeated even the lives of the differently gendered. In addition, for any female who is male identified and desirous of either hormone treatment or surgery, rejection of homosexual identity is necessary. The clinics and professionals that act as gatekeepers to the availability of medical treatment have clearly constructed case profiles which applicants are expected to fit.[115] Several scholars, most recently Bernice Hausmann in her controversial book, *Changing Sex*, have argued that transsexuals know more about the medical condition known as Gender Identity Disorder than most doctors.[116] Transsexuals[117] must convince their doctors that they are entitled to such surgery.[118] Doctors determine suitability based on psychological testing and interviews. Transsexuals who wish to qualify for surgery learn how to tell their stories so that they will fit the requisite profiles.[119]

From my reading of the literature, the insistent rejection of homosexual desires and the distancing of one's self from gay identity appears more prevalent in the MTF population than in the FTM population. There are several possible explanations for this phenomenon. Many FTMs identify as male or transgendered without ever having surgery. Hormone therapy may be sufficient. If this is true, then the FTM population is less dependent on the medical profession and less likely to mediate their stories with an eye toward claiming the right to surgery.

Nonetheless, stories abound from FTMs who distance themselves after transition from their previous lesbian identities. Yet, this is not al-

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114. *Id.* at 134.

115. *See* BENJAMIN STANDARDS §§ 4.1.1–4.11.1, 5.1–5.2.4, *reprinted in* GENDER BLENDING, *supra* note 58, at 505–20; *see also* Rubin, *supra* note 54, at 476 (arguing that, especially in the past, transsexuals "had to be able to persuade a number of professions that they were determined to be completely 'normal' members of the target sex").

116. *See, e.g.*, HAUSMAN, *supra* note 57, at 110–40 (discussing the role of transsexuals in the diagnosis of gender identity disorders and arguing that the role of the doctor is essentially mechanical in nature).

117. The Diagnostic and Statistical Manual of Mental Disorders defines transsexualism as:

> The essential features of this disorder are a persistent discomfort and sense of inappropriateness about one's assigned sex in a person who has reached puberty. In addition, there is persistent preoccupation, for at least two years, with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex . . . . Invariably there is the will to live as a member of the other sex.

*Id.* at 2 (quoting AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 74 (3d ed. 1987)).

118. *Id.* at 143.

119. *Id.*

ways the case. Bruce, one of the subjects in Holly Devor's study, retains a strong attachment to his previous lesbian identity:

> I'm a lesbian man. . . . I'm very committed to the lesbian movement. I'm very committed to women. And to their struggle in this life. I just happened to be born with tits. . . . But I can't have tits. . . . I never used to look in the mirror. Now I shave every day. . . . I would like to be able to not have to be a man. I would like to be able to be a lesbian without tits. But I can't.[120]

3. "People think I am male and it is dangerous for me if they find out I am female."

a. *Brandon Teena*

Brandon Teena, born female but passing as a male, made quite a hit with a number of females.[121] Once discovered to be a she by her lovers, Brandon represented to her lovers that she was a pre-op transsexual and that she would have surgery as soon as she could afford it. Some of these lovers still refuse to admit that Brandon was female. After moving from Lincoln, Nebraska to a smaller, less tolerant town in Nebraska, Brandon started a relationship with another young female. The people in the town thought Brandon was male. When her anatomical sex was discovered by two males she had hung out with, their response was to rape and beat her. Within a week Brandon was dead and the two males arrested for murder.

Brandon's story has struck a strong chord with the transgendered community, especially with young FTMs who identify with Brandon's attempt to pass as male. Brandon had fought for inclusion in the local community as male. The fact that he was murdered by two males, members of the gender group he wished to join, strikes some as a particularly unsettling betrayal. Also, it is unclear whether Brandon's female anatomy would have been discovered had he not been arrested by the local police, who, once they had discovered his anatomical gender, "outed" him to members of the local community.[122] Thus, there is also a betrayal by public servants who are entrusted with protecting the vulnerable from harm. Transgender activists have rallied for an investigation into the responsibility of the local police in contributing to Brandon's murder and for possible infringements of his civil rights.[123]

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120. DEVOR, *supra* note 59, at 448 (statement of Bruce).

121. For a thorough account of the story of Brandon Teena, see Roger Worthington, *Deadly Deception: Teena Brandon's Double Life May Have Led to a Triple Murder*, CHI. TRIB., Jan. 17, 1994, Tempo, at 1.

122. Davina Anne Gabriel, *Background of the Murder of Brandon Teena* (visited Oct. 12, 1998) <http://www.ftm-intl.org/ftm/News/Bran/bran.bkgr.html>. A documentary film based on Brandon's story won the Teddy for best documentary at the 1998 Berlin Film Festival. THE BRANDON TEENA STORY (Bless-Bless Prods. 1998) (Susan Muska & Greta Olafsdottir, filmmakers).

123. Gabriel, *supra* note 122.

b. *Leslie Feinberg*[124]

> When I say I am a gender outlaw in modern society, it's not rhetoric. I have been dragged out of bars by police who claimed I broke the law when I dressed myself that evening. I've heard the rap of a cop's club on the stall door when I've used a public women's toilet. And then there's the question of my identity papers.
>
> My driver's license reads *Male*. The application form only offered me two choices: *M* or *F*. In this society, where women are assumed to be feminine and men are assumed to be masculine, my sex and gender expression appear to be at odds. But the very fact that I could be issued a license as a male demonstrates that many strangers "read me" as a man, rather than a masculine woman.
>
> In almost thirty years of driving I've heard the whine of police sirens behind my car on only three occasions. But each time, a trooper sauntered up to my car window and demanded, "Your license and registration—sir." Imagine the nightmare I'd face if I handed the trooper a license that says I am female. The alleged traffic infraction should be the issue, not my genitals. I shouldn't have to prove my sex to any police officer who has stopped me for a moving violation, and my body should not be the focus of investigation. But in order to avoid these dangers, I broke the law when I filled out my driver's license application. As a result, I could face a fine, a suspension of my license, and up to six months in jail merely for having put an *M* in the box marked sex.
>
> And then there's the problem of my passport. I don't feel safe traveling with a passport that reads *Female*. However, if I apply for a passport as *Male*, I am subject to . . . felony charges.[125]

4. "I am a third sex."

Many transsexuals want more than anything to pass in the role of the opposite sex. If they identify as transsexual at all, they do so pre-op or during transition. However, with the growth of the transgender movement, more individuals are embracing their transsexual or transgender identities.[126]

FTM and MTF transsexuals often embrace both their maleness and femaleness and express a longing to be identified as both, rather than

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124. LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL 61 (1996). The following section excerpts a portion of Feinberg's book.

125. Anyone who knowingly makes a false statement in an application for a passport violates federal law and is subject to a fine, imprisonment, or both. 18 U.S.C. § 1542 (1994 & Supp. II 1996).

126. In a recent survey, admittedly skewed towards people who are more likely to be open about their transsexuality, over half of the respondents self-identified as transsexual and over ten percent identified as transgenders. *See* Dallas Denny & Jan Roberts, *Results of a Questionnaire on the Stanards of Care of the Harry Benjamin International Gender Dysphoria Association*, *in* GENDER BLENDING, *supra* note 58, at 326, 327 tbl. 1.

either/or.[127] Kate Bornstein, by contrast, an MTF, expresses a desire to be neither as opposed to one or the other: "I know I'm not a man—about that much I'm very clear, and I've come to the conclusion that I'm probably not a woman either . . . ."[128]

Many of the FTMs in Holly Devor's study express dual identities that embrace both femaleness and maleness.[129] Bruce, for example, says: "So I feel like I'm a third gender."[130] He hopes for the day when it will be okay to have both male and female identities in the same person. But for now, "I have to be a transsexual man because there is no place for me as a third gender."[131]

Thirty-three percent of the FTMs in Devor's study said that they believed transsexual people went through a stage of being both male and female.[132] Many of them said that they retained some of the feminine part of themselves even after they had transitioned.[133] But the transition process is a slow one, not something that occurs overnight. And it is in this slow transition that transsexuals learn how to be both male and female. Bill, for example, says: "One can be both a man and a woman. I think most transsexuals experience this state in some part of transition. . . . I think it is accomplished through an acceptance of ambiguity, or role flexibility. . . . I have been and still am both."[134]

And Bruce, another Devor FTM, says:

> I've been growing into becoming a man. I didn't just all of a sudden decide to be one . . . . There's a whole personality change that takes place. There's a bonding that takes place with men. . . . .
>
> . . . An F to M stops being a woman when they deny who they are. See, I think the reality is, you are born physically a woman. You come into the world as a woman . . . and I think that you need to come to terms with that part of you, and then move on . . . . I don't think I'll ever stop being a woman.[135]

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127. For a discussion of this point, see PAT CALIFIA, SEX CHANGES: THE POLITICS OF TRANSGENDERISM, at ch. 8 (1997).

128. KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US 8 (1994); *see also* CALIFIA, *supra* note 127, at 245–77.

129. *See* DEVOR, *supra* note 59, at 447–58.

130. *Id.* at 448 (statement of Bruce).

131. *Id.*

132. *Id.* at 456.

133. *Id.* at 457 ("I have been and still am both. . . . [But] I am only comfortable with myself as having female components since I have fully lived and expressed myself as a male. . . . " (alterations in original) (statement of Bill)).

134. *Id.* at 457 (statement of Bill).

135. *Id.* at 457 (first, second, fourth, and fifth alterations in original) (statement of Bruce).

## V. SOME OBSERVATIONS

There is no single identifiable meta-narrative for persons who identify as FTMs. Nor do all aspects of the alleged meta-FTM narrative constructed by medical professionals apply only to FTMs. Butch lesbians share childhood experiences that are similar to FTMs. Butch lesbians identify with male heroes, embrace athletics, and are active tomboys. Butch lesbians may pass as men, not on a permanent basis, but for economic or safety reasons.[136] Butch lesbians are female, even though they may temporarily embrace masculine identities or attributes.

Some FTMs, even after hormones and therapy, embrace the female part of themselves. Those that do not, remain cognizant of the femaleness of their bodies. A female who has become a male may still retain female sexual organs.[137] Furthermore, although many FTMs elect "top" surgery, very few elect "bottom" or genital reconstructive surgery. Probably more frequently than MTFs, FTMs live with bodies that exhibit some maleness and some femaleness.

The laws of each state vary regarding legal change of sex on birth certificates.[138] In many states, however, the sex on one's driver's license is determined by the applicant's self-identification. Thus it is possible for the same person to be identified as female on one document and male on another.

In order to obtain sex reassignment surgery, the Benjamin Standards require that the applicant live successfully in the role of the desired sex for at least one year.[139] Thus, the medical profession requires anatomical females to pass as males before their bodies can be surgically altered to fit their male identities. During this period of transition, transsexuals live in an "in-between state" that is part male and part female.

After transition, some FTMs continue to embrace their prior female identities. Some FTMs identify as transsexual, which means that they acknowledge their prior lives as females. Even though able to pass successfully as men, these people are unwilling to forsake the reality of their lives as women. The integrity of such self-identification and the respon-

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136. *See* KATH WESTON, RENDER ME, GENDER ME: LESBIANS TALK SEX, CLASS, COLOR, NATION, STUDMUFFINS . . . 80–81 (1996) (essay based upon an interview with Jeanne Riley).

137. *See, e.g.*, DEVOR, *supra* note 59, at 472 (statement of Ken).

138. *Compare* CAL. HEALTH & SAFETY CODE § 103425 (West 1996) (requiring petition to superior court for issuance of a new birth certificate after surgical sex change), *with* N.C. GEN. STAT. § 130A-118 (1997) (requiring written request to State Registrar accompanied by notarized statement of physician that individual underwent sex reassignment surgery), *with* N.Y. PUB. HEALTH LAW § 4138 (McKinney 1985) (not addressing sex change as a basis for birth certificate alteration), *with* TENN. CODE ANN. § 68-3-203 (1996) (expressly denying amendments to birth certificates because of sex change surgery).

139. BENJAMIN STANDARDS § 4.9.1 Standard 9, *reprinted in* GENDER BLENDING, *supra* note 58, at 515 ("Genital sex reassignment shall be preceded by a period of at least twelve months during which time the patient lives full-time in the social role of the genetically other sex.").

sibility for a continuous sense of self in the world are values worth protecting, both for the individual and for the society with which the individual interacts. The only way to become one sex is to deny the reality of the prior life.

These observations are intended to emphasize that it is difficult and, perhaps, undesirable for transsexuals to become one sex by eliminating all traces of the other sex. Also, they are intended to call into question the bipolarization of sex and gender identity, which requires that we view a single individual as belonging for all time at one bipolar extreme to the exclusion of the other.

## VI. LEGAL CONCLUSIONS: DISCRIMINATION ON THE BASIS OF SEX

### A. *Current Status: Legal Protections in the Workplace for Transsexuals*

Title VII prohibits employers from discriminating on the basis of sex.[140] State laws modeled on Title VII contain similar prohibitions.[141] None of these laws specifically include or exclude transsexuals.[142] Municipal laws add additional protections against workplace discrimination. Some of these laws include discrimination against transsexuals, either under court interpretations of the word "sex"[143] or because they have been amended to include transsexuals as a protected class.[144]

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140. In addressing employer practices, Title VII states:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994).

141. *See, e.g.*, ALASKA STAT. § 18.80.22. (Michie 1996); ARIZ REV. STAT. ANN. § 41-1463 (West 1992); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1996); MONT. CODE ANN. § 49-2-303 (1997); N.J. STAT. ANN. § 10:5-12 (West 1993); N.Y. EXEC. LAW § 296 (McKinney 1993); OR. REV. STAT. § 659.030 (1989).

142. But note that Minnesota's Human Rights law, adding sexual orientation as a protected category, specifically included protection for transsexuals as well. *See* MINN. STAT. § 363.01 (1996) (defining "sexual orientation" to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness"). It is unique in that regard. *See also* Rentos v. Oce-Office Sys., No. 95 CIV. 7908 LAP, 1996 WL 737215, at *8–*9 (S.D.N.Y. Dec. 24, 1996) (holding that New York State human rights law prohibiting discrimination on the basis of sex includes discrimination against transsexuals).

143. *See, e.g.*, Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 396 (Sup. Ct. 1995) (holding that a FTM transsexual fell within the protections of New York City's regulatory prohibitions against discrimination based on sex).

144. *See, e.g.*, IOWA CITY, IOWA, REV. ORDINANCES 95-3697 (outlawing discrimination on the basis of "gender identity" which is defined as "a person's various individual attributes as they are understood to be masculine and/or feminine").

Early litigation by transsexuals claiming protection under Title VII resulted in a series of court holdings in which the term "sex" was interpreted to exclude transsexuals. Some courts reasoned that the word "sex" includes male and female, but not transsexuals who were both.[145] Others reasoned that employers who discriminated against transsexuals were discriminating not because of the plaintiff's sex, but because of the plaintiff's decision to change sex.[146] Still another held more simply that discrimination against someone who was a transsexual simply did not constitute discrimination on the basis of sex, but rather on the basis of transsexualism.[147]

Every court that has considered whether Title VII should cover discrimination against a transsexual qua transsexual has decided the issue against such an interpretation of the statute.[148] One recent case, however, indicates that transsexuals are not completely omitted from Title VII. In *Miles v. New York University*,[149] the plaintiff alleged sexual harassment by a male professor, claiming that he harassed her because she was a woman.[150] The court held that the plaintiff's claim could not be dismissed on the basis that she was a transsexual, rather than a biological, female.[151] One wonders, however, whether an alternative defense, "I sexually harassed her because transsexuals turn me on," would survive a motion to dismiss quite as readily. Since all courts have agreed that discrimination against transsexuals qua transsexuals is not covered, it is only a short step away to find that harassment against transsexuals qua transsexuals is similarly not covered.

In sum, there is virtually no protection under Title VII for transsexuals who transition on the job, or for transsexuals who fail to pass after transition, or for transsexuals who identify as transgendered rather than as male or female.

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145. *See, e.g.*, Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 473–74 (Iowa 1983).

146. *See, e.g.*, Grossman v. Bernards Township Bd. of Educ., No. 74-1904, 975 WL 302, at *4 (D.N.J. Sept. 10, 1975).

147. *See* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984).

148. *See* Rentos v. Oce-Office Sys., No. 95 CIV. 7908 LAP, 1996 WL 737215, at *7 (S.D.N.Y. Dec. 24, 1996) ("Every federal court that has considered the question has rejected the application of [Title VII] to a transsexual claiming employment discrimination."). But note that the federal district court in *Ulane* did rule in favor of the transsexual plaintiff. *See* Ulane v. Eastern Airlines, Inc., 581 F. Supp. 821, 839–40 (N.D. Ill.), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

149. 979 F. Supp. 248 (S.D.N.Y. 1997).

150. *Miles*, 979 F. Supp. at 249. The case was brought under Title IX, which prevents discrimination "on the basis of sex" in the context of educational programs or activities that receive federal financial assistance. *See* 20 U.S.C. § 1681(a) (1994). However, the court noted that the Title IX "on the basis of sex" term should be interpreted in the same way as similar language in Title VII. *See Miles*, 979 F. Supp. at 250 n.4.

151. *Id.* at 249–50. As stated by the court: "There is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to [the professor] . . . plaintiff was not a biological female." *Id.* at 249.

## B. *Critique of Current Title VII Doctrine*

The refusal of federal courts to extend Title VII's protection to transsexuals is unduly restrictive. One early decision by the Court of Appeals for the Ninth Circuit continues to be cited as controlling or persuasive by other courts. In *Holloway v. Arthur Andersen & Co.*,[152] the court refused to allow a MTF transsexual who transitioned on the job and was then fired to bring a Title VII claim for sex discrimination.[153] The court reasoned that a "plain meaning" approach to statutory construction required that the term "sex" be given its traditional meaning.[154] As further evidence that Congress intended only the traditional meaning of "sex," the court noted that attempts to amend Title VII to include "sexual orientation" discrimination had failed.[155] Applying a "plain meaning" analysis, the court reasoned that Title VII's "prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex."[156] In this one sentence, the court declared, without serious question, that there can only be two sexes—male and female.

### 1. There Are More Than Two Sexes

If Title VII must be read to protect only on the basis of biological sex, then courts must recognize that there are more than two sexes. As Professor Anne Fausto-Sterling has argued, according to current scientific knowledge, there are at least five, and perhaps more, sexes.[157] These include male, female, and three types of intersexed persons—so-called

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152. 566 F.2d 659 (9th Cir. 1977).

153. *Holloway*, 566 F.2d at 661.

154. *Id.* at 662.

155. *Id.* at 662 n.6 (citing nine bills from 1975–77 which sought to add Title VII protection based upon sexual orientation, all of which were defeated). *Holloway* was decided in 1977. At that time, perhaps, judges were not familiar with the delineation between transsexualism and sexual orientation. The need to add "sexual orientation" to Title VII's list of protected classes to effectuate protection of homosexuals was necessary because courts had held that "sex discrimination" did not include discrimination against homosexuals. *See* Smith v. Liberty Mutual Ins. Co., 395 F. Supp. 1068, 1101 (N.D. Ga. 1975). Although scholars have argued that homophobia and sexism are closely linked, courts have remained unwilling to expand the meaning of "sex" to include "sexual orientation." *See* Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 143 (4th Cir. 1996) ("Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality." (quoting DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979))). The argument that "sex discrimination" includes discrimination against transsexuals is a totally separate argument from the argument regarding sexual orientation. Nonetheless, the *Holloway* court dismissed the argument in less than a paragraph. *See Holloway*, 566 F.2d at 662.

156. *Holloway*, 566 F.2d at 663.

157. *See generally* Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, SCIENCES, Mar.–Apr. 1993, at 20–24. *But see* JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS, AND THEIR FAMILIES 6 (1994) (arguing that it does not "make sense to talk of a third sex, or of a fourth or fifth, when the phylogenetic scheme of things is two sexes. Those who are genitally neither male nor female but incomplete are not a third sex. They are a mixed sex or an in-between sex.").

true hermaphrodites (herms), male pseudohermaphrodites (merms), and female pseudohermaphrodites (ferms).[158] According to John Money, as many as four percent of all births may produce some variety of these intersexed persons.[159] Although most such newborns are assigned a sex that is either male or female and are medically treated to help their bodies conform to the assigned sex, their natural biological sex is mixed.

Sex reassignment surgery has also worked to create more than two sexes. The biological male who undergoes surgery to become a woman usually has a vaginoplasty. If physical appearance of genitalia were to define femaleness, then post-op MTF transsexuals would typically qualify as female. Since FTMs often forego phalloplasties, it is more difficult to classify them as male on the basis of physical appearance of genitalia. But to classify them as female would deny their reality. As opposed to the situation in the past, when most transsexuals were committed to relatively complete sex changes, an increased number of individuals, both MTF and FTM, elect medical intervention involving less than a complete change.[160] Such persons go through life with bodies that we might describe as "intermediate," somewhere between male and female.[161]

Every person has a sex. Title VII protects on the basis of sex and is intended to protect every person, regardless of what the person's sex is. Such an interpretation of Title VII is consistent with our liberal interpretation of anti-discrimination law.[162] Title VII ought to protect discrimination against transsexuals not only in cases where they can prove that discrimination occurred because they were perceived to be either male or female, but also in cases in which the employer claims that discrimination occurred because the employee failed to fit within the neat binary classification of male or female.

2. "Sex" Should Be Interpreted to Include Gender Expression

Although there is virtually no legislative history regarding the meaning of "sex" when it was added to Title VII, it must have meant more than biological sex. The image that senators had in mind when they discussed the addition of sex was that it would require employers to hire women with feminine roles and identities (e.g., wives and mothers tradi-

158. Fausto-Sterling, *supra* note 157, at 21.

159. *Id.*

160. *See* Rubin, *supra* note 54, at 476. This phenomenon, in part, is due to changing attitudes and practices within the medical community. *See id.*

161. *Id.*

162. *See, e.g.*, Armbruster v. Quinn, 711 F.2d 1332, 1336 (6th Cir. 1983) ("To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction. The impact of this construction is the broad interpretation given to the employer and employee provisions." (citations omitted)); *cf., e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (1976) ("[Title VII's] terms are not limited to discrimination against members of any particular race."). These and other cases recognizing the breadth of Title VII protections act to reject a strict bipolar (black/white) approach to racial discrimination.

tionally assigned to private sphere roles).[163] Some of them expounded on the difficulties that would ensue as women moved from the private sphere to the public sphere of work.[164] And yet the bill passed. To give effect to the bill, employers cannot require women to behave as men in the workplace. Feminine values must be protected. To that end, Title VII's coverage has been expanded by legislative amendment to cover pregnancy[165] and it has been interpreted to cover sexual harassment.[166]

"Sexual harassment" has recently been interpreted by the Supreme Court to include same-sex harassment.[167] Accepting the fact that Congress did not enact Title VII for the primary purpose of regulating same-sex sexual harassment, the *Oncale* Court nonetheless applied Title VII to a male on male sexual harassment claim, stating: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[168]

If Title VII was intended to make it possible for females with feminine sensibilities to work comfortably in the public sphere, then the statutory protections must be interpreted to cover expressions of feminine gender by transsexuals, whether or not the expression of such femininity by transsexuals was the principal concern of Congress. FTMs, whom the law may identify as male post-transition, but who retain and express their sense of the feminine, must be protected in order to carry out the purpose of Title VII's ban on sex discrimination. Similarly, MTFs, who express their femininity during transition even though their bodies may be more biologically male, must be protected.

### 3. MTF Transsexuals Must Be Protected in Order to Ensure Protection of Women, and FTM Transsexuals Must Be Protected in Order to Ensure Protection of Both Men and Women

When a transsexual transitions on the job, a decision to fire the individual often includes assumptions about the inappropriateness of the

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163. *See, e.g.*, 110 CONG. REC. 2577–78 (1964) (statements of Rep. Celler).

164. *See id.*

165. The Pregnancy Discrimination Act of 1976, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)), amended the definitions section of Title VII by adding subsection (k) which states, in part: "The terms 'because of sex' or 'on the basis of sex' include . . . because of or on the basis of pregnancy . . . ."

166. The sexual harassment cases in particular have shown that Title VII was intended to change the workplace from the male bastion that it was prior to Title VII to something different, a place in which females with feminine sensibilities could work comfortably. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1994) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." (internal citations and quotation marks omitted)).

167. Oncale v. Sundowner Offshore Servs., Inc., 116 S. Ct. 998 (1998) (holding that male-on-male harassment of a sexual nature is covered by Title VII).

168. *Id.* at 1002.

newly gendered person holding the same job as was held by the previously gendered person. *Ulane v. Eastern Airlines*[169] is a prime example of this situation. Ulane was attempting to keep her job as an airline pilot, a job which at the time of the case was held almost exclusively by men.[170] The decision to fire Ulane was likely prompted as much by a fear of female pilots as by a fear of transsexual pilots.

The situation presented in *Ulane* is not a unique one. Barbara Renee James lost her job in the electrical sales division of a hardware store when she transitioned from male to female.[171] And Jane Doe lost her job as a Boeing engineer when she transitioned on the job.[172] It is probably not coincidental that a number of litigated cases involve MTFs in jobs that have been historically held by men.

Legal protection of MTFs who transition on the job, and who want to continue holding jobs that have been identified as male jobs, is necessary to assure legal protection for persons born female who wish to hold those jobs. A primary purpose of Title VII is carried out if "sex" is read to include "MTF transsexuals."[173]

There is no evidence in the form of reported cases of a similar trend involving FTMs. In fact, in the only two FTM anti-discrimination cases that I found, the trial court judges both ruled in favor of the plaintiffs on the motion to dismiss the complaint.[174] However, it would not be surprising to find that women in "female" jobs who transitioned to being male had a harder time with their employers than other FTMs in more "androgynous" jobs. The story of Mario Martino suggests, for example, that despite "her" excellent credentials and experience as a nurse, co-workers avoided "him" and joked about "him" while he was in transition.[175] Eventually, he changed jobs. Legal protection of FTMs who wish to remain in or retain jobs that are traditionally thought of as "feminine" serves to protect persons born male who also wish to hold such jobs.

The stories from the Balkans show us that male roles that are traditionally honored and respected can be carried out by women passing as men with the blessing of the community, so long as there are no males

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169. 742 F.2d 1081 (7th Cir. 1984).

170. *Ulane*, 742 F.2d at 1082–83.

171. James v. Ranch Mart Hardware, Inc., 881 F. Supp. 478, 480–81 (D. Kan. 1995).

172. Doe v. Boeing Co., 846 P.2d 531, 533–34 (Wash. 1993).

173. See text *supra* accompanying note 168.

174. In *Maffei v. Kolaeton Industry, Inc.*, the court held transsexuals were protected under New York City human rights laws. 626 N.Y.S.2d 391, 395–96 (Sup. Ct. 1995). The second case addressing FTMs, *Conway v. City of Hartford*, found transsexuals were protected under laws prohibiting discrimination on the basis of mental disability, even if not protected under laws prohibiting discrimination on the basis of sex. No. CV 950553003, 1997 WL 78585, at *3–*7 (Conn. Super. Ct. Feb. 4, 1997).

175. *See* discussion *supra* Part IV.B.2.a.

available.[176] Our own post-World War II history tells us that the same is true of our culture. Rosie the Riveter was held in high esteem until the male troops came home. Legal protection of women who pass as men in order to hold masculine jobs,[177] or of FTMs who transition in "masculine" jobs, will help women who wish to hold such jobs. Thus, the purposes of Title VII are better served by a statutory interpretation that includes transsexual and transgendered persons within its protections.

## VII. CONCLUSION

Current anti-discrimination law, in particular Title VII, prohibits discrimination on the basis of sex. Most courts have interpreted this language to exclude discrimination against transsexuals. A recent district court opinion in New York suggests that Title VII may apply to transsexual plaintiffs, provided the discriminator does not know that the plaintiff is transsexual.[178] Such interpretations of sex discrimination law are too limited. Transsexuals, even those who pass successfully in their new gender roles, cannot be viewed as solely male or female. Their stories teach us that individual gender identity is too fluid to force all persons into the bipolar scheme that current Title VII jurisprudence seems to presume. Title VII's sex discrimination jurisprudence must be reconceptualized to account for the reality of individuals who are both male and female, whether at the same moment in time or at different moments over time.

176. *See* discussion *supra* Part IV.A.1.

177. *See, e.g.*, FEINBERG, *supra* note 124, at 12–13 (discussing her experience passing as a male museum guard).

178. Miles v. New York Univ., 979 F. Supp. 248, 248 (S.D.N.Y. 1997).

# SHOPPING FOR RIGHTS: GAYS, LESBIANS, AND VISIBILITY POLITICS

NAN ALAMILLA BOYD*

## INTRODUCTION

"How do you plan for your future together?" American Express Financial Advisors ask two "lesbian-looking" women in a recent advertisement in *Out* magazine, a gay and lesbian periodical.[1] In the same issue, Budweiser poses a sweaty bottle of Bud Light against a can of the same under the caption "SIGNIFICANT OTHER."[2] Using images and language specific to lesbian and gay culture, these advertisements directly address a lesbian and gay audience. In the American Express ad, two white women lean gently against each other in warm sunlight as they gaze contentedly into the distance. American Express asks them to consider their future together—as a couple. In doing so, the advertisement links financial security to same-sex domestic stability. Financial planning secures the future for these presumed domestic partners; it links spending (and saving) to the profound "investment" many lesbian and gay couples have made in achieving the legal right to marry.

The Budweiser advertisement takes a slightly different approach in that it addresses gay couples as consumers rather than investors. Anheuser-Busch, the company that sells Bud Light, incorporates in-group language ("significant other") and subcultural activity (sweaty "bodies" in a bar atmosphere) to advertise its product to gay consumers. The advertisement's gay-positive directive, "Be yourself and make it a Bud Light," legitimizes queer choices—particularly when the choice of homosexuality is accompanied by the choice of Bud Light.[3] Also, positioning a bottle and can of Bud Light as a kind of queer couple, this advertisement, like the American Express ad, sells an affirming message to queers about the viability of their relationships. Through marketplace

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1. *See* OUT, Mar. 1998, at 19.

2. *See id.* at 81.

3. Although there are important historic and subjective differences, in this article I interchange the terms "queer" and "lesbian and gay."

visibility, both advertisements associate queer dollars (or consumer loyalty) with the legitimacy of lesbian and gay lives.

Mainstream marketing to gay and lesbian consumers is not new. In 1979 Absolut Vodka placed advertisements in the *Advocate*, a popular gay magazine, and successfully generated name-brand loyalty among gay men.[4] Through the 1990s, however, advertisements directed toward lesbian and gay consumers have become increasingly specific in their representations of lesbian and gay culture. Advertisements by companies such as Budweiser or Miller Beer often appeal to queer consumers by representing same-sex couples or queer iconography rather than simply placing generic or crossover ads in gay and lesbian magazines. To many, these gay-specific advertisements document a breakthrough in queer visibility. Here, large multinational corporations affirm that gay and lesbian dollars matter. They visibly display the fact that gays and lesbians comprise an important market segment—a "niche" market, perhaps. Because visibility has been crucial to progressive gay and lesbian social movements, and because consumption in late capitalist development has become a primary aspect of citizenship, the increased visibility of lesbians and gay men, combined with the economic power displayed in these advertisements, seems to promise expanded civic recognition (citizenship) for lesbians and gay men.[5] In fact, the equation that visibility equals legitimization and enfranchisement is so embedded in lesbian and gay culture that many activists see corporate recognition of gay/lesbian spending power as a key to the contemporary struggle for civil rights.[6]

This article explores the politics of visibility implicit in the relationship between the "gay market" and social movement activism. First, it examines the political function of consumer visibility for queers, and it challenges the liberal equation that visibility realized through mainstream marketplace accommodation equals or reflects enhanced political strength for queers. Second, this article evaluates the commodification of lesbian and gay culture in recent mainstream advertisements. How do multinational corporations such as American Express and Anheuser-Busch manipulate representations of gay and lesbian life in order to achieve gay and lesbian consumer loyalty? What is the impact of cultural commodification? To explore these points further, I draw examples from the early-1960s formation of the Tavern Guild of San Francisco. The

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4. *See* Dan Baker, *A History in Ads: The Growth of the Gay and Lesbian Market*, *in* HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE 11, 12 (Amy Gluckman & Betsy Reed eds., 1997) [hereinafter BAKER, HOMO ECONOMICS].

5. *See* DAVID T. EVANS, SEXUAL CITIZENSHIP: THE MATERIAL CONSTRUCTION OF SEXUALITIES 89–113 (1993).

6. *See* GRANT LUKENBILL, UNTOLD MILLIONS (1995). By civil rights, I mean state sanctioned domestic partner benefits, employment non-discrimination legislation, or the inclusion of homophobic violence in hate crime prohibitions.

Tavern Guild used queer economic resources in the 1960s to achieve limited political alliances and expanded civil rights without relying on a politic of mainstream visibility. The example of the Tavern Guild questions whether mainstream visibility is necessary for economic power to translate into political strength. Moreover, it questions whether the commodification explicit in mainstream advertising contributes to gay and lesbian community strength. In fact, the contention that gays and lesbians as a consumer group command significant spending power has instigated a backlash against gay and lesbian civil rights.[7] By observing the impact of cultural commodification and posing alternative uses of queer economic power, this article suggests new ways of thinking about the relationship between queer consumption, political subjectivity, and civil rights protections.

## I. THE GAY MARKET AND SOCIAL MOVEMENT ACTIVISM

In the United States, gays and lesbians occupy a "culture of consumption." Not only is gay and lesbian culture expressed in marketplace activities such as bars, restaurants, and theaters, but gays and lesbians also participate in a larger social and political system based on the acquisition and consumption of goods. In a society saturated by mass media and mass markets, twentieth-century consumers are not simply buyers of goods, as Richard Wightman Fox and T.J. Jackson Lears explain, they are "recipients of professional advice, marketing strategies, government programs, electoral choices, and advertisers' images of happiness."[8] Consumption has become a primary characteristic of post-industrial civic life. Following this, as sociologist David T. Evans argues, sexual minorities have become "citizens" of developed capitalism through their role as legitimate and recognizable consumers.[9] In other words, because consumption has become an important part of contemporary political participation, for lesbians, gay men, bisexuals and transgenders, mainstream recognition of their status as consumers legitimizes their political subjectivity in the eyes of the state. For this reason, Lisa Peñaloza, a marketing professor, argues that gays and lesbians constitute a viable market segment. Their marketplace activity should be of interest to mainstream advertisers in that gays and lesbians are not only "identifiable, accessible, and of sufficient size,"[10] the traditional criteria of a market segment, but

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7. M.V. Lee Badgett notes that biased samples yielding disproportionately high reports of lesbian and gay annual incomes have become a part of an anti-gay discourse. *See* M.V. Lee Badgett, *Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men*, *in* BAKER, HOMO ECONOMICS, *supra* note 4, at 65, 66; *see also* Baker, *supra* note 4, at 18 (noting that the fear of backlash is often overestimated).

8. RICHARD WIGHTMAN FOX & T.J. JACKSON LEARS, THE CULTURE OF CONSUMPTION at xii (1983).

9. *See* EVANS, *supra* note 5, at 113.

10. Lisa Peñaloza, *We're Here, We're Queer, and We're Going Shopping! A Critical Perspective on the Accommodation of Gays and Lesbians in the U.S. Marketplace*, *in* GAYS,

gays and lesbians as a social group also comprise a distinct consumer culture which encompasses both marketplace expressions (buying patterns) and identifiable marketing strategies that allegedly influence gay and lesbian consumption.[11] In this way, lesbian and gay consumer culture is dynamic, but nevertheless determined by and dependent on its ability to successfully identify itself as a socially coherent group, a social class.

Social movement activism is a primary marker of lesbian and gay community strength and cohesion. In other words, the community's definition of itself as a social class springs from its collective consciousness of and resistance to oppression. While there have been many modes of resistance, some are more recognized and remembered than others. A dominant mode of resistance in lesbian and gay history has been that of acceptance, integration, and assimilation—the key to which has been the increased visibility of lesbians and gay men in mainstream society. As a result, a politic of mainstream visibility frames the history of lesbian and gay social activism. Two early lesbian and gay civil rights organizations, the Mattachine Society (founded 1950) and the Daughters of Bilitis (founded 1955), sought to increase the visibility of the homosexual in heterosexual society by promoting positive images ("advocating a mode of behavior and dress acceptable to society")[12] and educating professionals and civic leaders such as doctors, lawyers and the clergy about the plight of "this minority group."[13] In fact, the post-1953 Mattachine Society identified "education of the general public" to "correct general misconceptions" about the homosexual as their primary goal.[14] Later, the Gay Activist Alliance, a gay liberation organization, worked against the invisibility or negative stereotyping of homosexuals in the mainstream press.[15] In January 1970, they raided the offices of the *New York Post* and demanded "positive news coverage of Gays in establishment newspapers."[16]

More recently, queer organizations such as GLAAD, the Gay and Lesbian Alliance Against Defamation, work to promote images of lesbians, gays, bisexuals and the transgendered in the mainstream media, spe-

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LESBIANS, AND CONSUMER BEHAVIOR: THEORY, PRACTICE, AND RESEARCH ISSUES IN MARKETING 9, 10 (Daniel L. Wardlow ed., 1996).

11. *Id.*

12. *See Purpose of the Daughters of Bilitis*, LADDER, Sept. 1959, at 1, 1.

13. *Id.*

14. The Mattachine Society split in 1953 due to red-baiting, and its leadership shifted from one that stressed minority-group politics and the development of gay culture to one that stressed a politics of visibility focused on mainstream acceptance of the homosexual. *See* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 57–84 (1983); *see also Aims and Principles*, MATTACHINE REV., Jan. 1956, at 1, 1.

15. Terance Kissack, *Freaking Fag Revolutionaries: New York's Gay Liberation Front, 1969–1971*, 62 RADICAL HIST. REV. 104, 117 (1995).

16. DONN TEAL, THE GAY MILITANTS 134 (1971) (quoting Arthur Irving, *Gay Activists Alliance News and Other Events*, GAY POWER, No. 11, 1970).

cifically television. They organize letter writing campaigns by viewers, and give annual awards to programs that maintain positive depictions of gay, lesbian or bisexual characters. Mainstream visibility has long been an important aspect of lesbian and gay social movement activism, and advertisements by multinational corporations that depict same-sex couples or queer culture seem an important contribution to this cause.

Because advertisements directed at gay and lesbian consumers enhance mainstream visibility, many gay activists and entrepreneurs celebrate the gay market's ability to attract corporate attention. Sean Strub, for example, noticed in 1985 that there were no gay lists registered in *The Standard Rate and Data Service Directory of Mailing Lists*,[17] so he founded a telemarketing company, Strubco, to assemble lists of potential queer buyers in a variety of gay and lesbian lifestyle categories.[18] These lists were useful initially in directing queer products to queer consumers, but the lists grew to become an important commodity themselves. Once predictable buying patterns are demonstrated, gay lists sell for top dollar to multinational corporations seeking queer consumers. In 1994, for example, AT&T and MCI both used gay lists in direct-mail campaigns to successfully target gay and lesbian consumers.[19] Moreover, research groups such as Overlooked Opinions and Simmons Market Research have encouraged corporate sponsorship by documenting the unique qualities of the gay market. In several early-1990s studies, they asserted the dubious claim that gay households have more overall income than heterosexual households, and they observed that gay couples, as "DINKS" (double income, no kids), are more conscious of marketing trends and, thus, more likely to be loyal name-brand consumers.[20] While others have argued against the plausibility of these claims, the enthusiasm gay entrepreneurs express toward the gay market evidences a deep investment in economic citizenship—the faith that gay buying power will somehow benefit gays (or at least gay entrepreneurs). Because advertising promotes the visibility and (allegedly) the legitimacy of lesbian and gay lives, it cements the relationship between economics and enfranchisement.

## II. TAVERN GUILD OF SAN FRANCISCO

There are other modes of queer resistance, however, and other ways that queer marketplace activity reflects social activism outside the equa-

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17. *See* Sean Strub, *The Growth of the Gay and Lesbian Market*, *in* A QUEER WORLD: THE CENTER FOR LESBIAN AND GAY STUDIES READER 514, 514 (Martin Duberman ed., 1997) [hereinafter A QUEER WORLD].

18. *See id.* at 514–15.

19. *See* Baker, *supra* note 4, at 15–18.

20. The biased quality of these findings have been well documented. *See* Badgett, *supra* note 7, at 65–68; Baker, *supra* note 4, at 11–20; Amy Gluckman & Betsy Reed, *The Gay Marketing Moment*, *in* BAKER, HOMO ECONOMICS, *supra* note 4, at 3, 3–10.

tion that visibility equals civil rights. In San Francisco, in the early 1960s, homophile organizations were obvious places for lesbians and gay men to assert their political strengths. Both the Mattachine Society and the Daughters of Bilitis were headquartered in San Francisco, and they organized mainly around the problems of homosexual invisibility and medical misrepresentation. As mentioned above, they functioned as reform movements which projected positive images of the homosexual and sought to "educate of the public" about the unthreatening gender and sex normativity of the "sex deviant."[21] Through the 1950s and 1960s, however, they drew only small numbers (10–20) to their monthly meetings, and although their monthly newsletters reached a larger audience, homophile organizations seemed unable to tap into the much larger queer community. They were especially unable to address the needs of the community's bar-going constituents.[22] In early 1962, however, an informal Tuesday afternoon drinking society comprised of gay and lesbian bar owners and bartenders decided to band together more formally to protect themselves from continued police harassment. They met at the Suzy-Q, a gay bar on Polk Street, and called themselves the Tavern Guild of San Francisco. In a "thumbnail history" of the organization, the original members reasoned that "the unjust and intolerable laws, the method of enforcing them, and the seriousness of their consequence gave this weekly drinking group purpose and determination to build an organization which collectively could fight the discriminatory acts against our community."[23] They elected Phil Doganiero, a popular Suzy-Q bartender, as the first president of the Tavern Guild and continued to meet weekly on Tuesday afternoons at alternating host bars to discuss the needs of San Francisco's gay bar owners and bar-going populations.[24]

The function of the Tavern Guild of San Francisco (TGSF) was similar to many fraternal and ethnic organizations that surfaced in the

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21. *See Purpose of the Daughters of Bilitis*, *supra* note 12, at 1.

22. In 1954 Mattachine Society chapters in the Bay Area totaled 40 members. By 1960 Mattachine's national membership had risen to 230, but this total included members from San Francisco, Los Angeles/Long Beach, New York, Boston, Denver, Philadelphia, Detroit, Chicago, and Washington D.C. *See* D'EMILIO, *supra* note 14, at 115; S.F. MATTACHINE NEWSL. (San Francisco Mattachine Society, San Francisco, Cal.), May 15, 1954.

23. LEST WE FORGET: A THUMBNAIL HISTORY OF THE TGSF 1 (Gay and Lesbian Historical Society of Northern California Archives (GLHS), Tavern Guild of San Francisco (TGSF) Collection, San Francisco, Cal.) [hereinafter LEST WE FORGET].

24. During the first year of operation, bar owners and bartenders who participated in Tavern Guild activities worked at the Handle Bar (1959–60), 1438 California St.; Lupe's Echo (1952–54), 545 Post St.; Keno's (1950–56), 47 Golden Gate Ave.; Chili's (1954), 141 Embarcadero; Coffee Don's (1950s–1960s), Pine Street at Leavenworth; The Sea Cow (1954–56) and The Cross Roads (1956–63), both at 109 Steuart St.; Cal's (1957–62), 782 O'Farrell St.; Dolans Supper Club (1940s–1956), 406 Stockton; The Paper Doll (1940s–1961), 524 Union Street; The Beige Room (1951–58), 831 Broadway; and Suzy Q's (1960–62), 1741 Polk Street. *See id.* at 2; ERIC GARBER, HISTORICAL DIRECTORY OF LESBIAN AND GAY ESTABLISHMENTS (GLHS Archives, TGSF collection). Many of these establishments had been closed by the California State Alcoholic Beverage Control Board or the San Francisco Police Department's Vice Squad. *See* LEST WE FORGET, *supra* note 23, at 1.

United States in the early-twentieth century.[25] By pulling together collective resources, TGSF was able to cushion the economic hardship of its members, mostly small business owners and employees, while simultaneously protecting members from police harassment and/or the manipulations of organized crime.[26] Within its first year, the TGSF instituted a number of policies that helped protect gay bar owners and their clientele from regular harassment by the police and the California State Alcoholic Beverage Control Board (ABC) which issued and revoked tavern licenses. They established a telephone networking system–a phone tree–to track police and ABC movement, so if a bar was being raided or harassed TGSF members would quickly find out. They also set up a bad check list "to protect itself from its over-indulgent customers."[27] Also, primarily due to the level of police harassment at this time, gay bars in San Francisco averaged only six months to a year in operation. Unemployment was a constant threat to bar employees, so the Tavern Guild set up a loan fund for its unemployed members, a group medical insurance plan, and an employment development program.[28] TGSF also developed a number of business practices that undercut the traumas of a competitive market. They fixed prices at reasonable rates and worked against unfriendly "rumormongering."[29] A "leaked" story, for instance, that a particular bar was being watched by the police would quickly ruin a good business.[30]

By July 1962, TGSF composed its first formal constitution, identifying itself as "a non-profit organization established to exchange information and ideas for the operation of our particular caliber of establishments."[31] Clearly, Tavern Guild members recognized their interests as business owners, but the function of the Tavern Guild exceeded a simple economic explanation. The gay bar, as a marketplace activity, had become an important cultural institution in queer urban life, so bar owners, employees, and patrons shared an (albeit unequal) interest in the economic success of the bar.

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25. *See generally* JOHN E. BODNAR ET AL., LIVES OF THEIR OWN (1982) (discussing the economic progress of African Americans, Italians, and Poles in Pittsburgh from 1900–1960 and the measures taken to attain it); OLIVER ZUNZ, THE CHANGING FACE OF INEQUALITY (1982) (examining the evolution of Detroit's ethnic organizations from 1880–1920).

26. *See* Bill Plath, The Tavern Guild: A Record of Accomplishment, Address to the Tavern Guild of San Francisco (Apr. 5, 1966) (transcript available in the GLHS Archives, TGSF Collection). For more information about mafia control of gay bars in New York City, see GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940 (1994).

27. LEST WE FORGET, *supra* note 23, at 3.

28. *See* Plath, *supra* note 26.

29. *Id.*

30. Charlotte Coleman, an early member of TGSF, claimed that price-fixing was one of the most important original purposes of the Tavern Guild. Coleman opened The Front at 600 Front St. in 1959 with the $1000 settlement money she received from the IRS after they fired her "for associating with persons of ill repute." Interview with Charlotte Coleman, TGSF Member and Owner of The Front tavern, in San Francisco, Cal. (July 13, 1992).

31. CONSTITUTION OF THE TAVERN GUILD OF SAN FRANCISCO (1962) (GLHS Archives, TGSF Collection).

The sheer popularity of bar-related socializing within lesbian and gay communities gave TGSF members economic strength. Because the bar functioned as a kind of community center, it engendered a great deal of patron loyalty—and a growing sense of itself as an economic community, a consumer group. With time, Tavern Guild members developed friendly relations with beer distributors, touring breweries and promoting their products at Tavern Guild events. In return, beer distributors began to support gay bar owners during disputes with the law. Charlotte Coleman, a TGSF member and owner of a lesbian bar called "The Front" remembers, "[Beer distributors] were behind us to fight anything that went wrong because they were making a lot of money through us."[32] She adds that the San Francisco's Tavern Guild "was a great thing in the end because it got the government—the ABC and the police department—to leave us alone a little bit because we showed some strength."[33] Because Tavern Guild members were able to control the spending power of this lesbian and gay marketplace, bar owners and bartenders found that they could influence the state institutions that policed them.

Fund-raising, as a result, became the key to Tavern Guild successes. In 1964, TGSF hosted a drag ball (a gay masquerade party), the Beaux Arts Ball, where participants dressed up, danced, and elected an "empress." José Sarria, San Francisco's first Empress and a long-time drag performer at the Black Cat Bar, an early gay tavern on San Francisco's waterfront, remembers:

> This was 1964, and the Black Cat had just closed . . . they wanted to thank me for all I had done fifteen, twenty years before that. Plus, the then leaders of the Tavern Guild saw a way to make money, so they gave what they called the Beaux Arts Ball. They wanted to name me, which they did, the queen of the Ball. And from then I became, I made myself Empress.[34]

The Tavern Guild's acknowledgment of Sarria's community service developed into a "court system," an internal government, whereby an election process, and a New Year's Day coronation established an annual slate of bar community representatives. Today, according to Sarria, drag "courts" have been established in most large cities in the United States. Election festivities, as fund-raising events, net huge profits, and the elected "court" functions as a grant-giving organization, returning profits to community organizations.[35] Money garnered from TGSF events such

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32. Interview with Charlotte Coleman, *supra* note 30.

33. *Id.*

34. Interview with José Sarria, San Francisco's First Beaux Arts Ball Empress, in San Francisco, Cal. (May 20, 1992).

35. *See* Nan Alamilla Boyd, San Francisco Was a Wide Open Town: Charting the Emergence of Gay and Lesbian Communities through the Mid-Twentieth Century 193–213 (1995) (unpublished Ph.D. thesis, Brown University) (on file with the Brown University Library); *see also* NAN

as the Beaux Arts Ball allowed its members to promote leadership within the bar community, protect their own legal and financial interests, contribute to a number of charitable causes (including homophile organizations), and most importantly, intervene in evolving gay politics in San Francisco. Rikki Streicher, owner of Maud's, a Haight-Ashbury lesbian bar, notes:

> The Tavern Guild was probably singly the reason why bars achieved a success politically.[36] Because a buck is the bottom line at all times. And the bars had commanded an enormous amount of money in terms of the city. So when they began to invite politicians to their meetings, the politicians realized that here's an organized group and . . . number one, they have money and, number two, they have votes.[37]

Although Streicher jumps ahead of the story, the Tavern Guild's history provides an interesting case because in it the relationship between social movements and the gay market is reversed. Rather than social movements providing visibility which attracts marketing, advertisement, and consumer identification, the Tavern Guild represents a marketplace activity that, in order to protect itself, evolves into a social movement.

While the Tavern Guild, as a business association, gained a certain amount of political momentum, even authority, as a social movement, it remained ideologically distinct from homophile movements. Homophile organizations pursued visibility and assimilation into the larger society; the Tavern Guild did not. Both groups sought civil rights, but the Tavern Guild, as a representation of queer bar culture, denied assimilation as a political goal. It remained preoccupied with protecting its right to assembly—its right to maintain distinct subcultural institutions that were relatively free from police harassment and marketplace instability. In this way, the Tavern Guild was able to control queer dollars and shop for rights without relying on visibility politics.

The tension between "separatist" subcultural politics and mainstream visibility politics frames a difference in lesbian and gay political strategy that continues to this day. Like homophile movements, GLAAD and the Human Rights Campaign (HRC), two of the most important national gay and lesbian organizations, rely on a politic of visibility and

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ALAMILLA BOYD, WIDE OPEN TOWN: SAN FRANCISCO'S LESBIAN AND GAY HISTORY (forthcoming 1999).

36. One facet of this success was realized in December 1959, when the California Supreme Court held a law providing for revocation of liquor licenses of bars which serve as a "resort" for homosexuals facially invalid. *See* Vallerga v. Department of Alcoholic Beverage Control, 347 P.2d 909, 912 (Cal. 1959); *see also* Boyd, *supra* note 35, at 174–77.

37. Interview with Rikki Streicher, in San Francisco, Cal. (Jan. 22, 1992) (footnote added). Rikki Streicher was owner of Maud's, San Francisco's famous lesbian bar made more famous by the documentary by Paris Poirer, *Last Call at Maud's*. *See* LAST CALL AT MAUD'S (Water Bearer Films 1993). Streicher participated in the Tavern Guild through the late 1960s and 1970s.

mainstream accommodation to achieve civil rights protections. Meanwhile, the "court system," a network of drag balls and coronations that elect local, state, and national representatives, remains outside of the spotlight of mainstream activism despite their impressive fund-raising abilities. With queer dollars raised at queer events, the court system feeds a queer infrastructure, funding community institutions such as hospice care, LGBT community centers, and queer performing arts.[38]

## CONCLUSIONS

Mainstream advertisements directed toward lesbian and gay consumers publicly affirm the economic strength of the lesbian and gay community. Advertisements depicting same-sex couples or queer iconography increase the visibility of lesbian and gay lives. This combination of strength and visibility promises to some citizenship and increased access to civil rights. However, there are problems with this equation. While research data depicting lesbian and gay wealth has successfully attracted the corporate sponsorship of lesbian and gay media and community events, it also has become part of an anti-gay discourse that lobbies against lesbian and gay civil rights. Anti-gay activists have used the alleged wealth of gay couples to manipulate a public fear of homosexual power and assert the existence of a well-funded gay agenda. For example, Colorado for Family Values used Simmons Market Research data in literature that supported Amendment Two, Colorado's 1992 state referendum to prohibit gay and lesbian civil rights protections. They argued that gay and lesbian communities did not need civil rights protections because they were already disproportionately wealthy. "Are homosexuals a 'disadvantaged' minority? You decide! Records show that even now, not only are gays not economically disadvantaged, they're actually one of the most affluent groups in America!"[39] Anti-gay activists have also used Simmons Market Research data to lobby against federal legislation such as ENDA, the Employment Non-Discrimination Act, which would protect gays, lesbians, bisexuals, and the transgendered from employment discrimination. While anti-gay uses of market research information relies on common confusion between "special rights" and civil rights, gay and lesbian civil rights activists have had to contest the statistics generated by gay consumer enthusiasts in order to correct the misleading impression that all gays and lesbians live comfortably in a $50,000 in-

38. José Sarria notes that "we are now the largest fund-raising organization in the gay community in San Francisco." Interview with José Sarria, in San Francisco, Cal. (Apr. 15, 1992).

39. Badgett, *supra* note 7, at 65 (quoting literature published in 1992 by Colorado for Family Values, a right-wing anti-gay religious organization based in Colorado Springs, CO).

come bracket.[40] Clearly, the transformation of queer culture into a consumer lifestyle problematically misrepresents the diversity of lesbian and gay lives; specifically, it misrepresents the need for basic anti-violence protections.

As the commodification of queer culture in mainstream advertisements functions to make certain kinds of lesbians and gay men more visible and, therefore, more politically powerful, it alienates others, deepening the gulf between privileged and non-privileged queers. Advertisements not only render invisible whole segments of the lesbian and gay community, they solidify social inequalities based on gender, race and class. As Sarah Schulman argues, the majority of queers are not represented in mainstream media images, and the false image of the wealthy white gay man breeds resentment.

> This false gay man is so clearly not living next door, not your son, not Asian, not your car mechanic, not your friend, not your lover, not you. It is a mythical, eroticized, far-away Other who can never enter your world or your soul. It allows straight people a way to accept the existence of homosexuality without ever having to have their own sexual identity implicated by it. More importantly, they can pretend away the power they actually do have and falsely re-position themselves as under the thumb of rich homosexuals.[41]

Representations of gay consumers in mainstream advertisements often reproduce racial and gender hierarchies by positioning people of color and women (if represented at all) in subordinate positions.[42] In this way, a politic of mainstream visibility reflects and reinforces social inequalities within the lesbian and gay community. As Amy Gluckman and Betsy Reed note, "[T]he sword of the market is slicing off every segment of the gay community that is not upper-middle-class, (mostly) white, and (mostly) male."[43] Clearly, as corporate recognition secures a certain amount of political agency for the social group, the group becomes increasingly narrow. Also, because mainstream marketers are interested in predictable and disciplined consumer groups, the commodification of queer culture tamps down its creative, and often flamboyant, critique of heterosexuality, racial inequality, and/or sexism. In other words, as civil rights get attached to a particular image of lesbian and gay consumption, how and when will civil rights protections expand to protect those who are not immediately recognizable—or those who are unruly, reluctant, or sub-

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40. *See generally* Karen Engle, *What's So Special About Special Rights*, 75 DENV. U. L. REV. 1265 (1998) (examining the uses of the term "special rights" by gay rights opponents and proponents).

41. Sarah Schulman, *The Making of a Market Niche*, HARV. GAY & LESBIAN REV., Winter 1998, at 17, 20.

42. *See* Alexandra Chasin, *Selling Out: The Gay/Lesbian Market and the Construction of Gender*, SOJOURNER, June 1997, at 14, 14–15.

43. Gluckman & Reed, *supra* note 20, at 7.

versive shoppers? What is the relationship between queers and capitalism beyond the easy equation that mainstream visibility equals civil rights? What are other ways queers might use their marketplace activities to subvert heteronormativity and secure broad-based civil rights protections?

M.V. Lee Badgett offers one solution in addressing queer workplace activism.[44] On the job, queer workers can organize and press for nondiscrimination policies and/or same-sex domestic partner benefits. Queer workplace activism also involves building coalitions with other activist organizations, such as unions, which can lead to the strengthening of worker solidarity and rights. Finally, queer workplace activism can affect local or state politics. Here, she cites the impact of Microsoft's Gay, Lesbian, and Bisexual Employees of Microsoft (GLEAM) on Oregon's Measure 9 and Colorado's Amendment 2, two state referenda aimed at prohibiting municipal gay and lesbian civil rights protections. GLEAM lobbied company officials to oppose Measure 9 and Amendment 2. They also developed workplace coalitions with African American, Latino, and other Microsoft employee groups, strengthening their overall impact on company policies. Badgett rejects consumer agency in the face of queer workplace coalition politics, and she positions worker rights as the key to civil rights rather than mainstream visibility or spending power.

Another solution lies with the kind of marketplace activism expressed by the Tavern Guild of San Francisco. While national gay and lesbian organizations such as the HRC work toward civil rights through mainstream visibility, subcultural institutions support queer culture in the interim. Marketplace activity that returns its capital to the queer community rather than placing its faith in the power of mainstream visibility—and its dollars in the pockets of multinational corporations—highlights an important political strategy. Here, lesbians and gay men use their buying power to support queer institutions and sustain fledgling and often fragile community institutions. Lesbian and gay buying power directed toward queer institutions debunks a liberal faith in "the system" and seeks, instead, to secure and protect subculture resources. A politic of mainstream visibility, on the other hand, works toward the incorporation of lesbian and gay men into the body politic—it believes that lesbians and gay men can achieve full citizenship by breaking through the wall of mainstream invisibility.

Visibility politics have played an important role in the history of U.S. lesbian and gay social movements. However, mainstream visibility politics have always been a part of the project of assimilation, and assimilation necessarily projects a disciplined as well as a race- and class-specific image of the lesbian and gay community. The history of the San

44. M.V. Lee Badgett, *Thinking Homo/Economically*, *in* A QUEER WORLD, *supra* note 17, at 467.

Francisco Tavern Guild illustrates that queer marketplace activity as a political tool does not depend on a politic of mainstream visibility or a desire to assimilate into mainstream society. Instead, it encourages queers to be subversive shoppers, willing to forego the attentions of corporate advertisers for the promise of sustaining unpredictably queer lives and institutions.

# NOTE

# PENETRATING SEX AND MARRIAGE: THE PROGRESSIVE POTENTIAL OF ADDRESSING BISEXUALITY IN QUEER THEORY

KARLA C. ROBERTSON*

## INTRODUCTION

> *Two pure souls fused into one by an impassioned love—friends, counselors—a mutual support and inspiration to each other amid life's struggles, must know the highest human happiness;—this is marriage; and this is the only cornerstone of an enduring home.*[1]

Elizabeth Cady Stanton's century-old feminist vision of marriage as grounded in companionship remains deeply imbedded in our social consciousness. Society's vision of marriage focuses on love, companionship, commitment, and romance. People also commonly view marriage as the legal union of men and women, presumably heterosexuals. Although this vision of marriage as heterosexual companionship is deeply rooted within our social consciousness, law does not recognize the love and companionship model of marriage.[2] Neither case law nor statutes requires marriage to be a union of companions, lovers, friends, partners or even heterosexuals.[3] This disconnect between legal and social understandings of marriage reveals the heterosexual, companionship model of marriage as idyllic social myth.

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* J.D., University of Denver College of Law, 1998; Judicial Clerk for the Honorable Harold D. Vietor, United States District Court for the Southern District of Iowa, 1998–2000. I would like to thank Martha Ertman for assisting me with the development of this Note, without whom it could not have been written. I would also like to thank Janet Halley, Todd Ingram, and Julie Nice for their helpful comments; Frank Valdes; and all of the participants of the InterSEXionality Symposium.

1. 1 HISTORY OF WOMAN SUFFRAGE 22 (Elizabeth Cady Stanton et al. eds., 1881).

2. This Note will demonstrate that in fact love and commitment fail to occupy a determinative place in formal marriage law. Despite this fact, lawmakers also contribute to the mythology that legal marriage is about heterosexual love. For example, in the recent debates about the "marriage penalty," Republican lawmakers referred to the tax as "a tax on love." *See* Aaron Zitner, *GOP Rides Herd on "Love Tax,"* ROCKY MTN. NEWS, May 3, 1998, at 2A. Despite this characterization by lawmakers, the institution of marriage does not contain such a requirement.

3. This Note focuses on ceremonial or formal marriage. *See infra* Part I. In many states, couples may also form the marital union through common law marriage. *See generally* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996) (discussing the evolution of common law marriage and its current status and desirability for women).

Instead of constructing marriage laws around companionship or identity, family law doctrine constructs marriage around sex.[4] Specifically, the act of penis-vagina penetration (PVP) is the essential element of a valid formal marriage.[5] This Note reviews case law and statutes to reveal that the central criterion for the validation, creation, and recognition of legal marriage is not love, not companionship, nor heterosexual identity, but instead the potential to engage in PVP. This Note exposes this pattern by exploring how the law responds to bisexuality in marriage. Examining bisexuality in marriage exposes the construction of legal marriage[6] as fundamentally sexual, and also reveals the progressive potential of focussing on bisexuality to undercut legal regulations which subordinate women and gay people.

Part I presents and analyzes three doctrinal areas that treat PVP as the determinative factor in legitimizing legal marriage: (1) case law concerning transgender marriage, (2) the Uniform Marriage and Dissolution Act (UMDA) and corresponding case law, and (3) the Defense of Marriage Act (DOMA). The transgender marriage cases most explicitly make spouses' potential for PVP the essential criteria for legal marriage. The UMDA and DOMA more subtly treat PVP as the cornerstone of marriage. Viewing marriage through a bisexual lens exposes the centrality of the PVP requirement in these contexts. To set the stage for this analysis, Part I explores multiple permutations of bisexual identity, thus setting the groundwork for an exploration of how bisexuality offers an underutilized tool for progressive analysis of marriage doctrine. Part II addresses an additional area of legal regulation—immigration—that complicates the questions regarding marriage regulation. Part III argues that notwithstanding marriage's conduct-based (PVP) nature, state courts and Congress present marriage as status-based, specifically heterosexual status. Part IV suggests that PVP is an illegitimate and unprincipled basis for defining legal marriage because it has little to do with the benefits that flow from marriage. Additionally, the PVP criterion perpetuates the subordination of women. This Note concludes by arguing that in today's debate over same-sex marriage, in which moral arguments are used to convince citizens that only heterosexual companionship is deserving of society's sanctions, exposing the fact that formal marriage is based on

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4. Family law also encompasses divorce regulation; this Note, however, primarily focuses on the creation of a formal marital union.

5. It has also been similarly argued that marriage is for sex. *See* Sally F. Goldfarb, *Family Law, Marriage, and Heterosexuality: Questioning the Assumptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 285 (1998) (stating that marriage is for "heterosexual genital intercourse" and arguing for redefining the meaning of marriage in order to open marriage to same-sex couples).

6. This Note limits its analysis to American law. Other countries recognize same-sex marriage and may define the hallmark of marriage by factors other than PVP. For an exploration of marriage regulation outside the United States, see Barbara E. Graham-Siegenthaler, *Principles of Marriage Recognition Applied to Same-Sex Marriage Recognition in Switzerland and Europe*, 32 CREIGHTON L. REV. 121, 129 (1998).

PVP, a sexual act, should help pave the way for a re-examination of legal marriage and lifting the ban on same-sex marriage.

## I. LEGAL MARRIAGE DEPENDS ON PENIS-VAGINA PENETRATION

An analysis of pertinent doctrine reveals that legal marriage turns on the ability to engage in one particular sex act: penis-vagina penetration. Courts explicitly state this, requiring that men possess the "necessary apparatus"[7] in order to be married. Men need this particular apparatus—the penis—in order to "function as a husband."[8] In order to be legally married, couples must possess the capacity to "engage in normal sexual relations,"[9] normal being defined as PVP. Legally married couples find trouble when the partners cannot continue to sexually fulfill the "marriage contract."[10] This language, extraordinarily explicit, designates PVP as the essential characteristic of marriage. Courts and legislators rely on this requirement to determine which unions to recognize, overlooking and even dismissing ideals of love, companionship, commitment, and heterosexual orientation, which received wisdom tells us are central to marriage.

### A. *Transgender Marriage*

State courts' treatment of transgender[11] marriage illustrates that the determinative criteria for granting legal recognition of marriage is the spouses' potential to engage in PVP. The most striking example of this fact is the New Jersey Superior Court decision in *M.T. v. J.T.*[12] In this action for spousal support and maintenance, M.T., the plaintiff, was a male to female transsexual.[13] M.T. was born with male sexual organs but transitioned to a female identity, completing the transition by surgery which removed her male genitalia and constructed a vagina.[14] Prior to this

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7. *See* Frances B. v. Mark B., 355 N.Y.S.2d 712, 717 (Sup. Ct. 1974).

8. *See id.*

9. *See id.* at 713.

10. *See generally* Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500–01 (Sup. Ct. 1971). The marriage contract includes the expectation of sexual relations. *See* RESTATEMENT OF CONTRACTS § 587 (1977). This expectation also illustrates that marriage depends on PVP.

11. There is much debate and some consensus regarding the terms transgender and transsexual. A common definition of the term transsexual is a person who has undergone sex reassignment surgery (SRS) to change his or her biological sex. *See* MARTINE ROTHBLATT, THE APARTHEID OF SEX 17 (1995). The term transgender most commonly describes all those who are differently gendered, including transsexuals, cross-dressers, and drag queens. *See* GORDENE OLGA MACKENZIE, TRANSGENDER NATION 2 (1994). Some scholars and activists prefer not to use the term transsexual, arguing that it places too much emphasis on genitalia as the defining characteristic of gender identity. *See, e.g.*, Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 32 n.130 (1995). This Note discusses cases including individuals who have undergone SRS, and uses transgender and transsexual interchangeably.

12. 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

13. *M.T.*, 355 A.2d at 205.

14. *Id.*

transition, M.T. met J.T., and informed him of her sexual and gender identities as they became romantically involved. One year after the surgery, M.T. and J.T. were married in a ceremonial marriage.[15] Following this marriage, they lived together and had sexual intercourse.[16]

As a defense to M.T.'s claim for support, J.T. asserted that his marriage to M.T. was void because she was not female but male.[17] The Juvenile and Domestic Relations Court disagreed, finding that M.T. was legally female and ordered J.T. to pay spousal support.[18] J.T. appealed, arguing once again that M.T. was male.[19]

In resolving the maintenance dispute, the New Jersey Superior Court framed the central issue as whether the marriage between J.T. (a biological male) and M.T., a postoperative male to female transsexual, qualified as a legal marriage between a man and woman.[20] The court found M.T. to be legally female and therefore eligible to be married to J.T. Most importantly, the court decided that in determining the sex of a person, "the anatomical test, the genitalia of an individual, is unquestionably significant and probably in most instances indispensable."[21] This factor was most significant for the court because "it is the sexual capacity of the individual which must be scrutinized."[22] An individual must be able to "engage in sexual intercourse either as a male or female."[23] In other words, an individual must be able to penetrate or be penetrated. In this

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 208.
21. *Id. But see* Corbett v. Corbett, 2 W.L.R. 1306 (P.D.A. 1970). The court in *Corbett* determined that a person's sex is decided and fixed at birth. *Id.* at 1323. The legal validity of a union for marital purposes, then, depends on a person's chromosomes. Under this view of sex, the sex change process becomes invisible, invalid, and/or ineffective for purposes of marriage benefits. This essentialist understanding of sex directly contradicts the thesis of this Note in that it focuses on chromosomes rather than PVP to define marriage. But *Corbett* can be distinguished; the British courts decided the *Corbett* case. This Note deals with policy and case law from the United States. Furthermore, the court's reasoning in *Corbett* mirrors my arguments about why the legal recognition of marriage is based upon penis-vagina penetration. *See infra* Parts III–IV. For example, the court stated that sex must necessarily be decided based upon biology because a male to female transsexual, for example, "cannot reproduce a person who is naturally capable of performing the *essential role of a woman in marriage*." *Id.* at 1324–25 (emphasis added). Apparently, the court believed this role to be child bearing as a consequence of being on the receiving end of PVP. The court treated "biology as destiny" approach, reducing "the essential role of a woman in marriage" to becoming pregnant through PVP. The *Corbett* court's reasoning would fail to explain why sterile women can get married, or why a woman who had a hysterectomy can receive alimony. For another interpretation of the *Corbett* case, see Mary Coombs, *Transgenderism and Sexual Orientation: More than a Marriage of Convenience*, 3 NAT'L J. SEXUAL ORIENTATION L. 1 (1997).
22. *M.T.*, 355 A.2d at 209.
23. *Id.*

case, M.T. acquired a vagina which allowed for such penetration, so the court recognized the marriage and ordered J.T. to pay spousal support.[24]

The emphasis on male to female penetration as the consummate requirement for marriage can also be seen in *Anonymous v. Anonymous*.[25] The plaintiff, a man, married a person whom he thought was a woman.[26] The plaintiff and defendant did not have sexual intercourse before the marriage, and the day after the marriage ceremony, the plaintiff discovered his spouse possessed male genitalia.[27] Notwithstanding this discovery, the parties remained married for some time. Eventually, however, the plaintiff filed an action requesting the court to annul the marriage.[28]

The court found for the plaintiff, holding that "the so-called marriage ceremony . . . did not in fact or in law create a marriage contract."[29] The court reasoned that the defendant was not female at the time of marriage, and a valid marriage requires the union of a male and a female.[30] Furthermore, the court noted that the parties never had a sexual relationship.[31] Apparently the court used the term "union" as a euphemism for PVP. Even though the defendant underwent a sex change operation after the marriage, but before the annulment action, the initial union did not constitute a valid marriage. The court granted the annulment not on the basis of fraud or incapacity, but on the basis that the two were not qualified to be married.[32]

One of the *Anonymous* court's most revealing statements regarding the PVP requirement is that "the mere removal of the male organs would not, in and of itself, change a person into a *true* female."[33] Apparently the court saw genetic composition as determinative in deciding whether a person is male or female. Later in the opinion, however, the court recounted another court's statement that "the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage."[34] This statement indicates that in determining a person's sex, and therefore the ability to marry, PVP is the key factor.

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24. *Id.* at 211. The court also stated that the decision to recognize a male to female transsexual who could sexually function as female "no way disserv[ed] any societal interest, principle of public order or precept of morality." *Id.* This statement underscores the operative principle argued in this Note: When a man is able to penetrate a person with a vagina, legal and moral recognition follow.

25. 325 N.Y.S.2d 499 (Sup. Ct. 1971).

26. *Anonymous*, 325 N.Y.S.2d at 499.

27. *Id.*

28. *Id.* at 499–500.

29. *Id.* at 501.

30. *Id.* at 500.

31. *Id.*

32. *Id.* at 501.

33. *Id.* at 500 (emphasis added).

34. *Id.* (quoting Mirizio v. Mirizio, 150 N.E. 605 (N.Y. 1926)). The *Mirizio* court continued on to say that a marriage relationship should exist with the result and the capacity for the "purpose of begetting offspring." *Mirizio*, 150 N.E. at 607. This emphasis on procreation was cited as a policy reason for the requirements of marriage. For a discussion of this empty justification, see Part I.B.2.b.

A third case which focused on the importance of penis-vagina penetration is *Frances B. v. Mark B.*[35] The plaintiff wife married the defendant husband, believing the defendant to be a man. The wife sought an annulment when she discovered the husband did not have a penis, asserting that the defendant "was unable to have *normal* sexual intercourse."[36] The defendant was a female to male transsexual who had successfully obtained a legal name change recognizing his transition.[37] Despite the husband's successful social transition, the court granted the annulment, based upon the defendant's purportedly deficient genitalia. While the court recognized that the defendant might pass as a man in society, he could not "function as a husband."[38] The court recognized the transsexual identity, but stated that "[a]ssuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable defendant to perform *male functions* in a marriage."[39] The court explained that "hormone treatments and surgery have not succeeded in supplying the *necessary apparatus* to enable defendant to function as a man for purposes of procreation."[40]

The court in *Frances B.* emphasized two things: the importance of possessing a penis and of using it for procreative purposes. The holding, therefore, appears to suggest that the ability to procreate is the basis of a valid marriage. However, the procreative use of the penis follows only after the acquisition of the penis, something that the plaintiff alleged, and the court found, the defendant did not possess. Additionally, the wife's key argument was that the defendant could not have "normal" sexual relations. The court recognized the validity of this claim by focusing on the insufficiency of Mark's male "apparatus." The penis as a tool for penetration, not procreation, occupied the central place in the court's analysis. Although the defendant could be recognized as a man in society, the marriage could not be legally recognized because the court found Mark did not possess a penis, which was essential for performing his marital function of penetrating Frances, with the possibility of procreation. The court found that Mark's deficient penis prevented him from engaging in procreative sex. What the court did not say, however, is as revealing as what it did say. Specifically, the court did not say that the

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35. 355 N.Y.S.2d 712 (Sup. Ct. 1974).

36. *Mark B.*, 355 N.Y.S.2d at 713 (emphasis added). The wife also sought an annulment based upon the fact that the defendant did not possess sexual organs. *Id.*

37. *Id.* at 714. The court granted a name change from Marsha to Mark after the defendant filed a petition explaining his emotional and physical condition as not female, but male. *See id.* Changing the sex on a birth certificate is also a pressing issue for many transgendered people, and courts sometimes refer to birth certificates to verify sex when deciding whether to grant a marriage license. *See In re* Ladrach, 513 N.E.2d 828 (Ohio Prob. Ct. 1987).

38. *Mark B.*, 355 N.Y.S.2d at 717.

39. *Id.* at 717 (emphasis added).

40. *Id.* (emphasis added).

central requirement for marriage was the ability to procreate and since Mark could not procreate, the marriage was invalid. Instead, the court focussed on possessing the proper genitalia and then *using* this genitalia. After meeting these two preconditions, procreation could follow.

This summary of transgender marriage cases illustrates courts' emphasis on PVP as the central element in determining the validity of marriage.[41] While some of these cases have discussed the ability to procreate as a necessary component of the marital relationship, this component is discussed within the context of penis-vagina sexual intercourse. In other words, it is not procreation itself that concerns the courts, but rather that procreation happens through penis-vagina sexual penetration. Thus, PVP functions as a necessary precondition for the method of procreation discussed and advocated by the courts.[42] Nowhere do these cases discuss whether the parties loved each other, were committed to one another, or were companions at the time of marriage, or sufficiently possessed a "heterosexual" orientation. In fact, discussions regarding sexual orientation are conspicuously absent from the cases, and instead the courts' decisions regarding marriage validity rest on conduct.

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41. One United States case, in addition to the British case previously discussed, see *supra* note 21, dismisses the relevance of penis-vagina penetration as a criteria of determining a valid marriage and instead relies on the chromosomal make-up of the parties. *See In re* Ladrach, 513 N.E.2d 828 (Ohio Prob. Ct. 1987). In *Ladrach*, a post-operative male to female (mtf) transsexual attempted to marry a male. The court held that the two individuals could not marry each other because they were of the same sex. *Ladrach*, 513 N.E.2d at 832. In finding that the parties were of the same sex, the court relied on the likely chromosomal make-up of the mtf transsexual. According to a doctor's testimony, the mtf transsexual would most likely not possess the chromosomes of a female. *Id.* at 830. Also, the court noted that the mtf transsexual's birth certificate reflected a male sex. *Id.* at 831–32. This fact, along with the likelihood of the chromosomal composition, provided the court with support for its holding. Moreover, when describing the case, the court dismissed the fact that the mtf transsexual possessed a vagina and, therefore, could engage in penis-vagina penetrative sex. *Id.* at 830–32. This case does not support this Note's PVP conclusion. However, of the handful of cases that have been decided on this issue, *Ladrach* exists as an outlier and minority view.

42. The importance of PVP has also been discussed by the United States Supreme Court. *See* Turner v. Safley, 482 U.S. 78 (1987). In *Turner*, the Court addressed whether the fundamental right of marriage can be burdened to a greater degree for prisoners than for non-prisoners. The regulation at issue in *Turner* allowed a prisoner to marry only with the approval of the prison superintendent. *Turner*, 482 U.S. at 82. The Court held the regulation to be unconstitutional. *Id.* at 97. In so doing, the Court discussed the "essential attributes" of marriage and the ability of these attributes to be preserved in the prison context. The Court stated that "[m]any important attributes of marriage remain, however, after taking into account the limitations imposed by prison life." *Id.* at 95. These elements included: (1) expressions of support and commitment, (2) an exercise of spirituality or religion, and (3) the expectation that most marriages will be "fully consummated" upon the inmates' release. *Id.* at 95–96. Emphasizing the expectation for consummation, the Court focused on the act of PVP. While it is unclear how the Court prioritized these elements (especially in light of the Court's statement of "most" instead of "all" in the consummation context), the Court assumed that marriage, in general, is granted with the expectation that there will be penetration. If an inmate was never able to consummate a marriage, because he or she was on death row for example, it is unlikely the Court would affirm such a union.

## B. *PVP Through the Lens of Bisexuality*

Like the transgender marriage cases, the UMDA and cases interpreted directly under the act, and DOMA, also treat PVP as the determinative element of a legal marriage. Unlike the transgender cases, however, in the UMDA and DOMA marriage is not constructed as explicitly dependent on PVP. But a careful analysis revealed through the lens of bisexuality shows that PVP is the determining factor for judges and lawmakers in these contexts as well, even if more subtly than in the transgender marriage cases.

### 1. Understanding Bisexuality

At the most basic level, bisexuals[43] can be described as having the potential to sexually desire both men and women. More specifically, bisexuals refuse or fail to choose a specific gender or sex as the object of their desire. Their sexual desire refuses the binary sexual construction of desire.

Bisexual identity can exist in many permutations.[44] This Note focuses on legally married bisexuals, but there are numerous other permutations including single bisexual people and bisexual men and women in same-sex relationships. The many permutations complicate an understanding of bisexuality.[45] Since few legal scholars have undertaken the

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43. Attempting to define or unpack the label "bisexual" is tricky business. Many components comprise identity, including legal status, desire, behavior, and perception. *See generally* John H. Gagnon, *Gender Preferences in Erotic Relations: The Kinsey Scale and Sexual Scripts*, *in* HOMOSEXUALITY/HETEROSEXUALITY 177 (David P. McWhirter et al. eds., 1990) (discussing aspects of identity and the Kinsey scale which measured identity based upon conduct and fantasies).

44. For a poststructural account of identity in general, see AFTER IDENTITY: A READER IN LAW AND CULTURE (Dan Danielsen & Karen Engle eds., 1995). Queer theory has persuasively demonstrated the dangers of relying on identity and theorizing around its constructions. *See, e.g.*, Lisa Duggan, *Making It Perfectly Queer*, *in* SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 155 (Lisa Duggan & Nan D. Hunter eds., 1995) (arguing against a political or legal movement based on an idea that sexual identity is "unitary" or "essential"). *But see* Suzanna Danuta Walters, *From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?)*, *in* SIGNS, Summer 1996, at 830, 837 (arguing that the politics of feminism and lesbian-feminism are at risk of being lost with the "deconstruction of the cohesion of identity"). This Note does not directly enter into this debate, but does strategically depend upon the existence (whether "real" or not) of a discreet and identifiable bisexual identity at some level to make the larger point about legal marriage. By using bisexual identity in this way, this Note engages in what has been called "strategic essentialism." *See* Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, *in* SELECTED SUBALTERN STUDIES 3, 13–15 (Ranajit Guha & Gayatri Chakravorty Spivak eds., 1988).

45. The term bi*sexual* implies a desire based upon a person's sex. This term simplifies the components of desire. For example, the number of bi-categories increases dramatically when a transgendered person has a bi-identity or a non-transgendered person desires a same-gender, transgendered person. In the case of transgender bi-desire, bi*sexual* fails to capture such an experience. Bi-gender or bi-gender identity may be more applicable. A discussion of transgender identity and politics is beyond the scope of this paper. For an excellent article discussing transgender

project of deconstructing the complex nature of bisexual identity,[46] the following section attempts to fill this gap by presenting some of the permutations of bisexual identity to illustrate that marriage is based on PVP.

For purposes of this Note, the term "identity bisexual" refers to a person who has refused to choose a gay or straight sexual orientation, and thus the term refers to a person's orientation and potential desire for both men and women, not the many ways a bisexual may choose to live his or her sexual life. The term "opposite-sexed bisexual" describes a person who has a bisexual orientation but is currently partnered with an opposite sex person. In the same vein, the term "same-sexed bisexual" describes a person who has a bisexual orientation but is currently partnered with a person of the same sex.[47]

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identity issues, see Hasan Shafiqullah, Note, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN'S L.J. 195 (1997).

46. *See infra* note 55 and accompanying text.

47. When I refer to opposite-sex and same-sex identities and relationships throughout this paper, I am relying on the traditional and conventional acceptance and understanding that there are only two sexes. I realize, however, that this is not biologically correct. *See* Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, *in* THE MEANING OF DIFFERENCE 68 (Karen E. Rosenblum et al. eds., 1996) (presenting empirical evidence that at least five sexes comprise the human race). This Note reveals that the entire body of family law marriage doctrine depends on the two-sex supposition. For this reason, Fausto-Sterling's work is monumental in showing that not only is the requirement of opposite sexed unions unprincipled because of the PVP requirement, the requirement is based upon an incorrect and flawed supposition. Fausto-Sterling states: "Western culture is deeply committed to the idea that there are only two sexes . . . . [T]oday it means being . . . subject to a number of laws governing marriage, the family, and human intimacy." *Id.* at 68. If this reality were to be acknowledged, the entire basis for legal regulation of human relationships would change. "Imagine that the sexes have multiplied beyond currently imaginable limits . . . . It would have to be a world of shared powers . . . . [M]ale and female, heterosexual and homosexual—all those oppositions and others would have to be dissolved as sources of division." *Id.* at 72. This Note uses such terms not to reify their mistaken meanings but instead to operate with common understandings of sex and relationships.

This Note will also refer to heterosexual orientation and heterosexuality. Such terms assume a lifetime of primary and/or exclusive opposite sex partnership or desire. In reality, even a person who exclusively partnered with the opposite sex may desire both women and men. Yet for the purposes of simplicity, this Note assumes this person has a heterosexual orientation. Additional terms could apply in other situations as well. "Functional heterosexual" could refer to a person who may sexually desire both sexes but has spent the majority of his or her recent life partnered with an opposite-sex person. "Social heterosexual" could refer to a person who, regardless of sexual orientation, moves through the world assumed to be heterosexual, because they often do not come out as gay, lesbian, or bisexual. All of these terms illustrate the fluid and dynamic nature of sexual orientation identities. Viewing sexual orientation, specifically bisexuality, as multidimensional and multifaceted can serve a broader liberational goal. What these terms do not show, however, is the legal construction of sexual orientation, specifically in the marriage context.

Finally, the term "legally unionized" could describe a person who has received state sanction for his or her partnership. In other words, a "legally unionized" person is a legally married person. This term does not establish any meaning particular to the sexual orientation of the spouses. Instead the term refers to the legal status given to a person and a couple by the state. The term "legally unionized" is more precise than marriage because marriage is constructed as and conflated with heterosexual orientation, which I later show and deconstruct. *See infra* Part III. Despite the efficacy of the term "legally unionized," I will continue to refer to marriage as marriage in order to deconstruct the term.

Bisexuals are essential and unique players in analyzing and understanding legal marriage. Despite this unique role, the diametrical opposition between gay and straight has been, according to Eve Kosofsky Sedgwick, a crucial element of modern Western culture.[48] According to Sedgwick, twentieth-century thought cannot be understood without understanding the relationship between homosexual and heterosexual:[49] "[A] whole cluster of the most crucial sites for the contestation of meaning in twentieth-century Western culture are consequentially and quite indelibly marked with the historical specificity of homosocial/homosexual definition . . . ."[50] This duality of homosexual and heterosexual lies at the heart of our "modern cultural organization."[51] Identity bisexuals, however, do not fall on either end of this diametric opposition. This organizing principle, nevertheless, serves as one of the bases for labeling bisexuals as either gay or straight, depending on the sex of their partners or the purpose of the classification. Although identity bisexuals have refused to choose, they have been forced into one of the only two options, heterosexual or homosexual. This coercive classification is not surprising since, based on Sedgwick's analysis, bisexuality challenges the very nature of our cultural organization. Accepting a bisexual orientation forces an expansion of dualistic thinking[52] and exposes the permeability of traditionally recognized identity boundaries. If Sedgwick is right, bisexuality also undermines fundamental classifications that inform Western thought. Since the stakes of maintaining the homo/hetero duality are so high, an analysis of how bisexual identity is treated has much to offer queer theory.

Identity bisexuals have come out and challenged the omnipresent nature of bipolar social construction.[53] The bisexual challenges to binary thinking about sexuality have met with considerable success, at least to the extent that bisexuals are lumped into the "gay" side of the social/sexual ledger. Most gay pride parade banners and many gay community centers recognize bisexuality. Sexual orientation anti-

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All of these terms are admittedly underinclusive. For example, it is possible that one person could simultaneously be referred to as an: "identity bisexual," "opposite-sexed bisexual," "social heterosexual," "functional heterosexual," and "legally unionized." It would be much easier to refer to such a person as either a "bisexual" or "heterosexual" depending on their partner status. The fact that a person could hypothetically fit into all of these categories at once, however, underscores the complexity of identity and need for a deeper understanding and more detailed representation of bisexuals.

48. Eve Kosofsky Sedgwick, *Epistemology of the Closet*, *in* THE LESBIAN AND GAY STUDIES READER 45 (Henry Abelove et al. eds., 1993).

49. *Id.* at 48.

50. *Id.*

51. *Id.*

52. *See* Ruth Colker, *A Bi Jurisprudence*, *in* HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 15 (1996).

53. For comments on bisexual identity, see *id.*

discrimination laws protect bisexuals.[54] Queer scholarship is also beginning to include work about bisexuality.[55] Yet, ironically, queer scholarship provides one of the starkest examples of bisexuality invisibility.[56] Bisexuals continue to be misunderstood because of the traditional dualistic social construction of sexual orientation identity itself.

One social construction of bisexuals is that they are heterosexual. Identity bisexuals are most often constructed in such a way when an identity bisexual legally marries a person of the opposite sex (thereby becoming an "opposite-sexed," "legally unionized" bisexual according to this Note's classification terms) and receives the state-generated privileges and benefits reserved for opposite-sex married couples. In this case, however, a bisexual person does not change his or her orientation. Upon marriage, this person could identify and be viewed as "legally unionized" (the beneficiary of governmental benefits) rather than heterosexual.[57] An opposite-sexed, legally-unionized bisexual would be assumed to be heterosexual until and unless s/he publicly came out as bisexual. In other words, a default rule presumes that being married means that the spouses are heterosexual. This default rule both mischaracterizes bisexuality and perpetuates the exclusivity of the marriage institution.

The diverse terms capable of describing various permutations of bisexuality illustrate the fluidity of bisexuality but also of sexual orientation in general (including heterosexuality). When one considers that identity bisexuals can and do freely enter and exit a legal union, the mythology that marriage is exclusively by and for heterosexuals gets destabilized. Such destabilization "is an important goal that can be partly accomplished by an emphasis on acts."[58] Applying this idea here (i.e.,

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54. *See, e.g.*, MINN. STAT. §§ 363.02–.03 (West 1997).

55. *See, e.g.*, Ruth Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY 127 (1993); Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98 (1995).

56. *See generally* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (failing to include bisexuals as meaningful participants in the creation of legal theory and to substantively distinguish how they might be the same or different in perpetuating the racism criticized).

57. *See supra* note 47, *see also infra* Part I.B.2.b. The Defense of Marriage Act (DOMA) assumes that those who marry are heterosexual. Labeling bisexuals as heterosexual, specifically when married, does not accurately reflect the position of bisexuals in society generally because bisexuals continue to be at risk of discrimination based on their orientation, not marital status. *See infra* note 107. In fact, bisexuals are often singled out for biased treatment, notwithstanding marital status. In the spring of 1994, the mayor of St. Paul, Minnesota, refused to sign a "gay rights" proclamation because of the inclusion of bisexuals and transgendered persons. *See* Anthony Lonetree, *Coleman Won't Sign Gay Month Proclamation*, MINNEAPOLIS-ST. PAUL STAR-TRIB., May 4, 1994, at 1B. The mayor stated that he would have signed the measure if it included only gays and lesbians because their identity was a "sexual orientation" deserving of "protected class" status. *Id.* Bisexuality, according to the mayor, was instead a "lifestyle issue" which does not deserve legal protection. *Id.* The mayor further stated that including bisexuals under the rubric of "gay and lesbian" represented the ultimate of "political correctness." *Id.*

58. Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1771 (1993).

adopting a number of terms for bisexuals depending on the acts of partnering) can destabilize marriage by showing the institution depends upon acts, rather than a particular sexual orientation. Revealing that identity bisexuals legally marry opposite sex partners disrupts the myth that marriage is a union based on heterosexual status.

2. Legal Marriage Under the UMDA and DOMA Depends Upon PVP

States traditionally regulate the confines of legal marriage.[59] In two instances, however, legal marriage has occupied national and federal attention. First, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Marriage and Divorce Act (UMDA), which serves as the model for state marriage laws.[60] Second, Congress passed the Defense of Marriage Act (DOMA)[61] which supplanted traditional state jurisdiction over marriage and family regulation by defining marriage as an opposite-sex union for federal purposes and supporting states that ban same-sex marriage. Under both DOMA and judicial interpretations of the UMDA, the dispositive criteria used to determine the legitimacy of a legal marriage is the potential for or actual vaginal penetration by a penis. Opposite-sexed bisexuals best reveal this point because they frequently receive the benefits and privileges of legal marriage without fitting the social description of eligible individuals (i.e., heterosexuals). When they enter the marriage institution *as bisexuals*,[62] they show that sexual orientation is immaterial to the defining characteristics of marriage. Bisexuals illustrate that PVP, rather than sexual orientation, is the key element of a legal marriage, necessitating a careful

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59. *See* Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 515–19 (1994). *See generally* Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996) (discussing marriage as a fundamental right and the social benefits and constitutional ramifications potentially arising from the abolition of marriage); Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1469–75 (1997) (discussing the roles of the states and federal government in regulating marriage). A live question exists whether the legal significance of marriage emanates from the United States Constitution or from the bundle of state-conferred rights and entitlements to legally recognized partnered individuals. The Supreme Court has recognized opposite sex marriage as a fundamental right. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967). Regardless of the source of the legal significance of the marital bond, states traditionally regulate the institution.

60. The UMDA was originally ratified by a national body entitled the National Conference of Commissioners on Uniform State Laws in 1970 and then amended twice by the same national body. At least eight states have adopted, at least in part, the UMDA including Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. *See* UNIF. MARRIAGE AND DIVORCE ACT, 9A pt. II U.L.A. 1 (1998) (providing table of jurisdictions adopting the act).

61. P.L. No. 104–199, § 2, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996) and 28 U.S.C.A. § 1738C (West Supp. 1998)).

62. This ability is not limited to bisexuals. Gays and lesbians also could freely enter the institution if they wished to do so with an opposite sex partner. Bisexuals are best situated, however, to play this subversive role because they are genuine participants in the mythology of marriage as romantic, love and commitment based. The main point here is that marriage laws do not consider, or even reject, sexual orientation on its face.

review of marriage doctrine. This exploration reveals that love and companionship fail to occupy a central, significant, or even minimal place in legal marriage.

a. *The Uniform Marriage and Divorce Act*

The UMDA[63] outlines regulations for marriage and divorce. The UMDA purports to "strengthen and preserve the integrity of marriage and safeguard family relationships"[64] and defines marriage as a "personal relationship between a man and a woman."[65] Evidence of a valid marriage under the act can take the form of reputation, cohabitation, or the acknowledgment of the parties.[66] The UMDA does not explicitly prohibit same-sex marriage.[67] Many courts, however, reason that the generally accepted definition of marriage as opposite-sex as defined by the UMDA precludes legal recognition of same-sex relationships.[68] Opposite-sexed bisexuals, however, can and do legally marry under the UMDA.

Facially, the UMDA does not require that the parties to a marriage love or even like eachother. Instead, the UMDA allows legal recognition of a formal relationship between two opposite-sex people simply based upon fact that the parties are opposite sexes.[69] Two people could do nothing more than acknowledge their commitment to one another by registering as a couple after solemnization[70] and thereby become lawfully married. The UMDA assumes that the parties are able to consummate the union simply by the couples' opposite sex composition.[71] Based upon the language of the UMDA, a bisexual could, therefore, have no sexual desire for, and never cohabitate or share finances with, her opposite sex partner but legally marry anyway. The partners could, moreover, despise one another. A bisexual person could announce at the wedding her sexual

63. *Id.* § 101 (amended 1973), 9A pt. I U.L.A. 171 (1998).

64. *Id.* § 102, at 171.

65. *Id.* § 201, at 175. To obtain a license in the registration process, the parties must present an application with their sex noted. This statement will be used to verify that the parties are opposite sex, or one man and one woman. If there is a question about the sex of a party, the birth certificate of an individual is often consulted. *See In re* Ladrach, 513 N.E.2d 828, 829 (Ohio Prob. Ct. 1987). This is why it is crucial for many transgender individuals to change their sex on their birth certificate.

66. *In re* Bailey's Estate, 423 N.E.2d 488 (Ill. App. Ct. 1981) (interpreting the formality provision of the Act).

67. UMDA § 207, 9A pt. I U.L.A. 1183 (1998) (providing a list of what types of marriages are prohibited including: (1) marriages between uncles and nieces and between aunts and nephews except as permitted by "established customs of aboriginal cultures," (3) marriages between brothers and sisters, (4) marriages between ancestors and descendants, and (5) marriages entered into prior to the dissolution of a previous marriage).

68. *See, e.g.*, Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

69. This requirement incorrectly presupposes that there are, in fact, only two sexes. *See* Fausto-Sterling, *supra* note 47.

70. UMDA § 206, 9A pt. I U.L.A. 1182 (1998) (requiring parties to register and be solemnized in order to obtain a marriage license).

71. *Cf.* UMDA § 208(a)(2), 9A pt. I U.L.A. 186 (1998) (holding a marriage to be invalid if a party lacks the physical capacity to consummate the marriage by sexual intercourse and the other party was unaware of the incapacity at the time of solemnization).

orientation and intent to remain identified and active as such but still enjoy the legal recognition of her opposite sex relationship. Therefore, this recognition is based solely on the sex (i.e., genitalia) of the partners, and their potential to engage in PVP using that genitalia.

Thus, marriage under the UMDA is based upon the genitalia of the parties. Facially, however, the UMDA does not provide any insight into the purpose for the opposite sex/genitalia requirement. The criteria used by courts deciding cases under the UMDA for declaring an attempted marriage invalid more explicitly articulate that PVP is the precondition to legal marriage. The UMDA outlines several reasons for invalidating a marriage. A marriage can be declared invalid if a party was induced into a marriage based on fraudulent grounds that relate to the essential elements of the marriage relationship,[72] or if a party lacks the physical capacity to consummate the union.[73]

The UMDA does not state what constitutes adequate grounds for alleging fraud. Cases interpreting this provision of the UMDA provide insight. In *Woy v. Woy*,[74] a husband sought an annulment, alleging that his wife failed to disclose her same-sex relationship history prior to their marriage.[75] At trial the wife denied she was a lesbian, but admitted she had sexual relations with a woman before and during her marriage to her husband.[76] Her husband identified his wife as bisexual.[77] The husband and the wife had sexual relations during their ten-year relationship.

The *Woy* court held that the wife's same-sex activities "had nothing to do with" the essential part of the marriage.[78] The court reasoned that because the marriage was sufficiently consummated, the wife's "lesbian activities" did not interfere with her ability to engage in "normal" and "usual" sexual relations with her husband.[79] The court stated

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72. UMDA § 208(a)(1), 9A pt. I U.L.A. 186 (1998). Courts shall also declare a union invalid if a party lacked the ability to consent, the marriage was prohibited, or a party was not of the appropriate age of consent. *See id.* § 208(a).

73. UMDA § 208(a)(2), 9A pt. I U.L.A. 1186 (1998). Consummate is defined as "to complete [the] marital union by the first act of sexual intercourse after marriage." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1986). The UMDA section governing marriage invalidity was intended to replace the traditional common law of annulments. In fact, this section purported to completely abolish the traditional grounds used to determine marriage fraud. UMDA § 208, 9A pt. I U.L.A. 186 (presenting the purpose for this section in the Comment following the specific provision of the act).

74. 737 S.W.2d 769 (Mo. Ct. App. 1987).

75. *Woy*, 737 S.W.2d at 770.

76. *Id.* at 771.

77. *Id.* (stating that when he spoke with his wife about her relationship with another woman he "realized that [his] wife was bisexual").

78. *Id.* at 773.

79. *Id.* at 774.

that "the . . . lesbian activities had nothing to do with the essential part thereof of sexual intercourse."[80]

The court further determined that the wife did not have an affirmative duty to disclose her same-sex sexual relationships prior to the marriage.[81] This determination was based upon the fact that the wife did not misrepresent her "lesbian" past, and mere non-disclosure did not rise to the level of fraud entitling the husband to an annulment.[82] The court likened same-sex activities prior to marriage to unchastity, which a party need not disclose to another party prior to marriage.[83] In contrast, a party must disclose pregnancy, venereal disease, sterility, and similar matters.[84] Notably, some of the things that must be disclosed (particularly venereal disease or impotence) could affect the capacity for and desirability of engaging in PVP. The court concluded that "annulment of marriage is the exception and not the rule, and must be granted only upon extraordinary circumstances."[85]

*Woy* demonstrates the centrality of PVP in defining a legal marriage under the UMDA. First, the court in *Woy* disregarded the sexual orientation of the parties to marriage. While married, Ms. Woy engaged in bisexual conduct by having sex with both men and women. The court morally condemned the wife's bisexuality (or bisexual conduct), stating that "lesbian activities are reprehensible conduct not in accordance with the normal mores of society,"[86] but for legal purposes it decided that the sole dispositive condition for the marriage was the existence of PVP.

The *Woy* decision further illustrates the dubious nature of the articulated justifications for marriage laws that fence out gays and lesbians. The UMDA purports to "strengthen the family" and "protect the institution of marriage." Yet the *Woy* court recognized that a woman can be sexually active with women before and during her marriage, condemned such behavior, but still upheld the marriage as valid, thus protecting the union of opposite sexual genitals. The court overlooked adultery and "homosexual" conduct because the necessary and dispositive element of legal marriage—PVP—was present. Conservative groups, including the Christian Coalition and Focus on the Family, however, would arguably assert that the *Woy* court weakened the family unit.[87]

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80. *Id.* at 773.
81. *Id.* at 774.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *See* Al Knight, *Primary System Distorts Christian Coalition Views*, DENV. POST, Feb. 25, 1996, at D1 (detailing the ideals of the Christian Coalition, an organization that was founded by Republican Pat Robertson, that includes right-wing issues such as anti-choice, prayer in schools, and anti same-sex marriage efforts); Michelle Mahoney, *Focus on the Family Sets Compass by Bible*, DENV. POST, Nov. 28, 1995, at E1 (explaining the conservative, Colorado Springs based group and

An additional insight offered by *Woy* relates to Ms. Woy's admission of engaging in sexual acts with both men and women while married. Had Ms. Woy been in the military, her conduct and admission could have justified her discharge.[88] Had Ms. Woy been a recent immigrant to this country and admitted such conduct in a petition for permanent residency, the INS could have denied her petition.[89] The same conduct, however, did not preclude legal recognition of marriage because the only relevant conduct was PVP.

Additional court decisions under the UMDA illustrate that marriage is based upon the potential for PVP much more than any companionship ideal. Courts uphold marriages when entered into solely for the purposes of financial gain or under false pretenses of love and affection. In *Henderson v. Ressor*,[90] for example, the court validated an ostensibly heterosexual marriage despite the fact that the sole reason for the union was to inherit property at the spouse's death.[91] In *Nebbitt v. Nebbitt*,[92] the court held that a woman's failure to disclose her lack of love and affection for her husband did not give rise to a fraud suit in tort. Neither *Henderson* nor *Nebbitt* required any showing of companionship between the spouses. Parties can marry for financial gain or without love, commitment, or affection as long as the parties are able to engage in PVP.

One additional case provides further support for the premise that PVP is central to legal marriage. In *Freitag v. Freitag*,[93] the court dismissed an annulment action filed by the wife who claimed that the husband had concealed his "homosexual tendencies."[94] Three weeks after the marriage, the husband became impotent.[95] Two to three weeks following the onset of impotence, the husband confessed his history of homosexuality prior to the marriage.[96]

Despite both the husband's history of homosexuality and the onset of impotence, the court refused to annul the marriage.[97] In reaching its decision, the court noted that prior to the marriage, the couple had been "intimate."[98] Additionally, the couple cohabitated upon their return from

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its central message of "preserving and strengthening the home" according to the Bible's teachings). Arguably, these right-wing groups might like the PVP focus because of its essentialist and narrow focus.

88. *See infra* note 108.

89. *See infra* Part II.

90. 126 S.W. 203 (Mo. 1910).

91. The *Henderson* case continues to be cited as good law. *See* Charley v. Fant, 892 S.W.2d 811, 813 (Mo. Ct. App. 1995) (citing the *Henderson* case as an example of a legitimate marriage).

92. 589 S.W.2d 297 (Mo. 1979).

93. 242 N.Y.S.2d 643 (Sup. Ct. 1963).

94. *Freitag*, 242 N.Y.S.2d at 643.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* The court, however, did not define "intimate."

a honeymoon.[99] Because of this cohabitation, the court implicitly assumed that the couple consummated the marriage (i.e., the husband penetrated the wife) when it stated that the husband was "incapable of *further* fulfilling his marital contract."[100] Thus it was not cohabitation (or companionship) itself which mattered, but cohabitation as indirect proof of prerequisite PVP.

The *Freitag* court dismissed the action for two related reasons. First, the case did not present a "true case of homosexuality."[101] Second, the court did not believe that "the condition of the defendant [was] incurable."[102] These statements illustrate the preeminence of PVP in evaluating the validity of marriage. The husband clearly acknowledged his previous homosexuality, but the court took pains to overlook this declaration. In doing so, the court ignored the sexual orientation of one spouse, focusing instead on the sexual component of the relationship and the future potential for PVP in the marriage.

As with the other marriage cases, the basis for granting state sanction of a marriage relationship does not turn on love or companionship, or even sexual orientation. Instead, courts labor to overlook and dismiss evidence of non-heterosexual orientation and its impact, leaving PVP as the most important factor in distinguishing valid from invalid marriages. In short, courts focus more on sexual behavior (i.e., consummation through PVP) than sexual orientation or love and commitment in deciding whether to legally recognize marriages.

b. *The Defense of Marriage Act*

Congress passed DOMA in 1996 to counteract the possibility that states might legally recognize same-sex marriage.[103] Congress offered five main goals and rationales for DOMA: (1) encouraging heterosexuality; (2) preserving government resources; (3) defending traditional notions of morality; (4) defending and nurturing the institution of traditional, heterosexual marriage; and (5) reserving the institution of marriage for procreation.[104] Despite precluding federal recognition of same-sex marriage, DOMA allows bisexuals to be legally married. Applying

99. *Id.*

100. *Id.* (emphasis added).

101. *Id.* at 644.

102. *Id.*

103. H.R. REP. NO. 104–664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 ("[DOMA] is a response to a very particular development in the State of Hawaii. . . . [T]he state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples:") (referring to Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), that set the stage for Hawaii to become the first state likely to recognize same sex marriage).

104. H.R. REP. NO. 104–664, at 7 n.21, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2911 n.21 ("Upholding traditional morality, encouraging procreation in the context of families, encouraging heterosexuality—these and other important legitimate governmental purposes would be undermined by forcing another state to recognize same-sex unions."); *id.* at 12, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916 (listing "four of the governmental interests advanced by this legislation").

each of the congressional rationales to a legal marriage with at least one bisexual spouse reveals the disingenuousness and ineffectiveness of DOMA and its rationales, and the fact that it is based on PVP. The application of the DOMA rationales to an opposite-sexed bisexual in a legal marriage reveals that the sole determinative criteria for granting legal recognition of marriage is not heterosexuality, but rather the potential for PVP.

The first rationale supporting DOMA (encouraging heterosexual orientation) can be easily discarded as illegitimate.[105] The fact that opposite-sexed bisexuals become legally unionized does not change their sexual orientation. Therefore, DOMA fails to encourage heterosexual orientation by allowing bisexuals to be recognized as legal partners in legal unions. If anything, DOMA encourages what might be called heterosexual *conduct*, which might be distinguished from what the congressional record seems to treat as heterosexual status. Just as the UMDA cases disregarded one spouse's non-heterosexuality, DOMA does not require bisexuals to forsake their orientation to be legally married. Thus, it does not provide any incentive for heterosexuality. While limiting the institution of marriage to opposite-sex couples may provide an incentive for an identity bisexual to partner with the opposite sex, the law focuses on sexual conduct, not sexual orientation. The second rationale for DOMA is similarly problematic. If protecting scarce governmental resources were a legitimate concern, bisexuals would also be fenced out of the institution in an attempt to preserve the institution's benefits for the truly deserving (read heterosexual).[106] Thus bisexuality exposes the incoherence of DOMA's rationales.

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105. While illigitimate, this rationale is not lacking in coercive power. *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* THE LESBIAN AND GAY STUDIES READER 227 (Henry Abelove et al. eds., 1993). Rich argues that there are many forces at work to coerce women to partner with men. *See id.* at 227, 232–33. To the satisfaction of Congress, DOMA would qualify as one of these forces. Rich, however, does not further argue that these forces convert women into heterosexuals. In fact, she argues that women live on a continuum of lesbian identities and that when women enter or live in a heterosexual union, it is not based upon their true or natural "orientation" per se, but instead on the benefits of the union. *See generally id.* "A woman seeking to escape such casual violations along with economic disadvantage may well turn to marriage as a form of hope-for protection." *Id.* at 235.

106. Furthermore, current legally unionized couples with a bisexual member should face a decrease or elimination of the financial benefits accorded by the government. There are many ways to limit increased governmental spending on marriage without invidiously fencing out a group. The justification of protecting government resources is clearly the only attainable, albeit circumspect, goal. According to the GAO, marital status affects more than 1000 federal laws. *See* Letter from Barry R. Bedrick, Associate General Counsel, General Accounting Office, to Henry J. Hyde, Chair of the Committee on the Judiciary, House of Representatives, (Jan. 31, 1997) (on file with the United States General Accounting Office, *available at* <http://www.access.gpo.gov/su_docs/aces/aces160.shtml>, Report No. OGC–97–16). The GAO claims that conclusions cannot be drawn about DOMA's overall affects on these laws because any particular law may disadvantage or advantage married or single persons. *See id.* However, the summary of categories of laws affecting marital status illustrates that marital status imparts far more financial benefits than disadvantages to married

The third rationale for DOMA (defending traditional notions of morality) also proves illusory when analyzed through the lens of bisexuality. The view of bisexuality as aligned with gay, and therefore morally repugnant, permeates our society.[107] Many members of Congress express this view.[108] Therefore, by allowing bisexuals entry into legal marriage, the institution becomes "morally contaminated." Yet DOMA fails to exclude bisexuals from marriage. If those in Congress who supported DOMA intended to uphold traditional morality, these members should have required a sexual orientation litmus test upon application for a marriage license. But this practice, just like requiring a test to determine procreative ability and desire, may well be unconstitutional.[109]

Congress attempted to distinguish between moral and immoral unions in DOMA's legislative history by distinguishing heterosexuality from homosexuality. To do so, Congress juxtaposed heterosexuals with homosexuals. For example, the legislation states that: "Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality

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couples. *See id.* Because all of the other justifications are unfounded and unattainable, protecting heterosexual wealth remains as the only feasible justification. Preserving heterosexual economic superiority exposes the intent to fence out a particular group simply because it threatens another's economic situation. Also, this argument inaccurately assumes that the government would be unable to extend resources. *See generally* John D'Emilio, *Capitalism and Gay Identity, in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 100 (Ann Snitow et al. eds., 1983) (arguing the development of capitalism provided the framework for the emergence of gay individuals and communities).

107. *See, e.g.*, Rowland v. Mad River Sch. Dist., 730 F.2d 444 (6th Cir. 1984) (holding that the termination of a bisexual school teacher was constitutional), *cert. denied*, 470 U.S. 1009, 1017 (1995) (Brennan, J., dissenting) (stating that "[n]othing in [Supreme Court] precedents requires that result"); Timothy M. Tymkovich et al., *A Tale of Three Theories: Reason and Prejudice in the Battle over Amendment 2*, 68 U. COLO. L. REV. 287 (1997). Tymkovich represented the state of Colorado in defending the anti-gay Amendment 2 before the U.S. Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996). Amendment 2 fenced out gays, lesbians, and *bisexuals* from the political process. *See* COLO. CONST. art. II, § 30b (held unconstitutional in *Evans*, 517 U.S. at 635). The Tymkovich article, mirroring the majority of Colorado voters, made no distinction between bisexuals and "homosexuals" when discussing the validity of Amendment 2.

108. *See, e.g.*, 10 U.S.C. § 654 (1994) (outlining the congressional Don't Ask, Don't Tell policy). This policy equates bisexuality with homosexuality in stating: "A member of the armed forces shall be separated from the armed forces if . . . . the member has stated that he or she is a . . . bisexual . . . ." *Id.* § 654(b)(2).

109. A sexual orientation litmus test would likely be unconstitutional under two theories. First, if opposite-sexed bisexual marriage applicants were required to assert a heterosexual identity, and refused legal recognition if they did not, they could allege their fundamental right to marriage was violated. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding the right to marry as fundamental). In this case, an opposite-sexed bisexual would argue that any restriction of this right must be supported by a narrowly-tailored, compelling state interest, a standard nearly impossible for the state to meet. The second approach for challenging such a test is based on the First Amendment. A bisexual, gay, or lesbian person could allege that basing marital benefits on an assertion or statement of sexual orientation is a content-based law that violates the First Amendment. *See generally* Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993) (arguing that an announcement of homosexuality communicates an idea, not only a status or conduct).

better comports with traditional (especially Judeo-Christian) morality."[110] Bisexuals are conspicuously absent from this discussion. One may think that it is not surprising for Congress to omit bisexuals, however, because they are uniquely situated to fit the description of "heterosexual" by choosing to marry a person of the opposite sex. While bisexuals may choose to marry someone of the opposite sex, they, like gays and lesbians, are not legally allowed to not marry a partner of the same sex. As previously discussed, the choice of partners is not determinative of bisexual orientation.[111] In other words, when an opposite-sexed bisexual becomes legally married, his or her sexual orientation does not change. Identity bisexuals by definition retain their non-heterosexual sexual orientation identity. Therefore, the institution is not exclusively "heterosexual," calling into question Congress's traditional notions of morality. By failing to require heterosexual orientation under DOMA, Congress failed to meet its goal of preserving traditional notions of morality.

Bisexuality similarly reveals the bankruptcy of the fourth rationale for DOMA. Congress and the President intended to defend "traditional, heterosexual" marriage with DOMA. But if bisexuals can marry an opposite sex partner, the only tradition being protected is two people of the opposite sex forming a legal union. The partnership at that point need not be comprised of two heterosexuals and is not, therefore, a "heterosexual" union in the sexuality sense.[112] Instead, the spouses would be legally unionized and if they remained married, functional heterosexuals. Congress and the President, however, apparently assume an opposite sex union constitutes a "heterosexual" union (in the sexuality sense). To illustrate, Congress stated that "society has made the eminently sensible judgment to permit *heterosexuals* to marry."[113] Additionally, Congress stated: "Civil laws that permit only heterosexual marriage reflect and honor a

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110. H.R. REP. NO. 104–664, at 15–16, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2919–20 (footnote omitted).

111. *See supra* notes 43–47 and accompanying text.

112. An argument can be made that when members of Congress use the term heterosexual, they mean to invoke only notions of opposite sex pairings and never sexual orientation. One definition of the term heterosexual is: "[O]f or relating to different sexes <[heterosexual] twins>." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1063 (1986). This definition supports the argument that Congress meant only opposite sex couples. However, Webster's definition of heterosexual lists the above definition last. The first definition listed under the term heterosexual is: "[O]f or relating to or characterized by heterosexuality <sexual relationships between individuals of opposite sexes are [heterosexual]>" *Id.* Heterosexuality is defined as: "[T]he manifestation of sexual desire toward a member of the opposite sex." *Id.* Finally, one last definition for heterosexual is: "[A] heterosexual individual." *Id.* These definitions, the ones implicating notions of sexual desire, occupy a more central place in the dictionary. Therefore, it is likely that Congress did not divorce notions of sexual orientation from the use of "heterosexual." Also, when ideas of opposite sex are implicated, they are associated with non-sexual partners, such as twins. Furthermore, by allowing only "heterosexuals" to marry, Congress implicates the definition of heterosexual, which is "a heterosexual individual" which in turn necessarily implicates sexual desire and sexual orientation.

113. H.R. REP. NO. 104–664, at 14, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2918 (emphasis added).

collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[114]

The fact that bisexuals can marry their opposite sex partners shows that DOMA fails to protect a "heterosexual" institution. Furthermore, the fact that bisexuals legally can avail themselves of protected status and financial benefits begs the question about what "traditional" union Congress hoped to protect. What does it mean that despite congressional attempts to reserve marriage for heterosexuals, bisexuals can and do marry? This means, in part, that the ideal fails to achieve the desired reality. The congressional ideal of only allowing state recognition of those with a heterosexual orientation fails to play out in practice.

The fifth and final of DOMA's rationales, that DOMA reserves the institution of marriage for procreation, is inherently empty. Congress stated: "[Society] has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children."[115] This goal is illusory in that fertility is not a prerequisite for legal marriage. Congressional response to this fact is as empty as the ideal itself. "Surely no one would propose requiring couples intending to marry to submit to a medical examination to determine whether they can reproduce, or to sign a pledge indicating that they intend to do so."[116] Congress would likely assert the same response to those who point out that bisexuals can marry, thereby rendering the traditional and heterosexual ideals as illusory and false. The appearance of tradition apparently matters to Congress, not the reality that being partnered with a member of the opposite sex is not necessarily synonymous with heterosexual status or identity.

Revealing bisexuals' ability to marry provides a trenchant critique of DOMA. If all of the goals forwarded by Congress are incoherent, there must be some unarticulated, additional reason for DOMA. This unarticulated goal is certainly not to legally recognize love and companionship. Congress even specifically states that "it is not the mere presence of love that explains marriage."[117] But not only is love insignificant, it is nonexistent in DOMA and our marriage doctrine. Congress can point to no provision in DOMA that codifies a "love" requirement. Congressional analysis of marriage in DOMA shows that the real reason for DOMA is to affirm PVP as a prerequisite for legal unions. First, Con-

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114. *Id.* at 15–16, *reprinted in* 1996 U.S.C.C.A.N. at 2919–20 (footnote omitted).

115. *Id.* at 13, *reprinted in* 1996 U.S.C.C.A.N. at 2917.

116. *Id.* at 14, *reprinted in* 1996 U.S.C.C.A.N. at 2918.

117. *Id.* at 13, *reprinted in* 1996 U.S.C.C.A.N. at 2917. The legislative history contains many quotes about the lack of significance of love in the legal marriage relationship. One example is: "The question of what is suitable for marriage is quite separate from the matter of love . . . ." *Id.* (quoting Professor Hadley Arkes, Amherst College).

gress uses "heterosexual" synonymously and interchangeably with "opposite-sex." For example, Congress defined marriage as the partnership between one man and one woman,[118] and further set out its regulatory purpose as "defend[ing] the institution of traditional heterosexual marriage."[119] Congress also contends that "the uniform and unbroken rule has been that only opposite-sex couples can marry."[120] If opposite-sex pairings neither guarantee nor represent procreative ability, an alternative reason for the requirement must exist. As in UMDA case law, the opposite-sex criterion must then be a euphemism for PVP. Logically, this conduct-based understanding of opposite-sex pairings, then, is the potential for or actual occurrence of PVP.

Under DOMA and the UMDA, bisexuals enjoy state sanction of their opposite sex relationships. Courts and legislators bestow such privilege upon them simply because of their opposite-sex unions. Justifications for DOMA rest upon tradition and encouraging moral families. Bisexuality, however, does not fit within commonly accepted societal notions of "moral" or "traditional," as evidenced by societal discrimination against bisexuals. Bisexuals, nonetheless, are free to marry under the UMDA, indicating that the only necessary criterion for marriage is genitalia deemed necessary to engage in PVP.

## II. COMPANIONSHIP AND SEXUAL ORIENTATION MATTER IN IMMIGRATION LAW

Although the general family law rule for granting legal recognition to couples turns on the capacity for PVP, a different rule may apply in other doctrinal areas.[121] Congress generally relies on the union of a man and woman, or more accurately a penis and a vagina, as a basis to protect the institution of marriage. Under DOMA and the UMDA, simply being "opposite-sex" entitles a couple to marital benefits. Congress, however, does not apply this conduct-based standard in all cases. Specifically, this approach does not apply to immigrants who either marry upon arriving in this country or who hope to join their spouses in the United States.[122] The Immigration Marriage Fraud Amendments[123] (IMFA) prevent an immigrant from attaining immediate permanent legal status in the United

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118. Defense of Marriage Act, Pub. L. No. 104–199, sec. 3, §7, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996)); *see also* H.R. REP. NO. 104–664, at 30, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2934.

119. H.R. REP. NO. 104–664, at 2, *reprinted in* 1996 U.S.C.C.A.N. at 2906.

120. *Id.* at 3, *reprinted in* 1996 U.S.C.C.A.N. at 2907.

121. The rule could be described as a "marriage-plus" situation. A "marriage-plus" situation exists when litigants present a court with not only a marital, family law issue, but an additional issue legislated by Congress or interpreted by the courts.

122. The treatment of marriage in the immigration context best illustrates this "marriage-plus" situation. The marriage plus situation at issue here is marriage plus immigration.

123. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99–639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.).

States, even if s/he is married to a United States citizen.[124] Instead, an immigrant married to a U.S. citizen is only granted permanent residency on a two-year conditional basis.[125]

In order to obtain permanent legal status, the immigrant must demonstrate that the marriage was not entered into for the purpose of "procuring an alien's entry as an immigrant."[126] The immigrant and her or his citizen spouse are required to demonstrate a good faith marriage by filing a petition detailing that the marriage was: (1) entered into in accordance with state law, (2) valid at the time of petition, and (3) not entered into for the purpose of gaining legal status for the immigrant.[127] The immigrant and her or his citizen spouse also must meet personally with a representative from the Immigration and Naturalization Service (INS) so the representative can determine whether the couple entered into the marriage in good faith.[128] The statute further requires individuals to prove the legitimacy of their relationship. Evidence of this legitimacy includes pledges of commitment, cohabitation, and a disavowal of the purpose of attaining legal status from the union. The interviews are quite invasive. INS officials question the man and woman separately to determine whether they each know the details about the other's daily lives.[129] In determining the legitimacy of the marriage, courts consider "evidence relating to the degree of commitment by both parties to the marital relationship"[130] which includes considering all "relevant evidence."[131] Courts have interpreted the requirements of the "good faith" requirement to mean, in part, that the parties intended to "establish a life together" at the time of their marriage.[132] Thus, the IMFA, as interpreted, requires proof of a genuine companionship.

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124. 8 U.S.C. § 1186a (1994).

125. *Id.* § 1186a(a)(1).

126. *Id.* § 1186a(b)(1)(A)(i). The immigrant must also remain married from the time of entry through the time of receiving his or her permanent status. *Id.* § 1186a(b)(1)(A)(ii).

127. *Id.* § 1186a(d)(1)(A)(i). The petition must also include the address of each party since the immigrant obtained permanent residence on a conditional basis. *Id.* § 1186a(d)(1)(B)(i). This requirement implies that it is essential for the immigrant and spouse to live together in order for the immigrant spouse to attain permanent residence.

128. *Id.* § 1186a(c)(1)(B), (d)(3). The Attorney General, or designee, may waive the requirement of an interview if s/he feels it is appropriate to do so. Even before the Amendments were enacted, the INS met with immigrant spouses to determine the validity of the marriage. *See* James A. Jones, Comment, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U. L. REV. 679, 681 (1997).

129. *See* Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriages*, 68 S. CAL. L. REV. 745, 804 n.227 (1995).

130. Chand v. INS, No. 96-70901, 1997 WL 415348, at *1 (9th Cir. July 24, 1997).

131. *Id.*; *see also* 8 C.F.R. § 216.5(e)(2) (1998).

132. *See, e.g.*, *Chand*, 1997 WL 415348, at *1 (quoting Bu Roe v. INS, 771 F.2d 1328, 1331 (9th Cir. 1985)).

In 1986, Congress enacted the Immigration Marriage Fraud Amendments to curtail "fraudulent marriages."[133] At that time the INS asserted that close to 30 percent of petitions for immigrant visas involved "suspect marriages."[134] Since 1986, the INS disclaimed this statistic and admitted that the number of people attempting to obtain legal status through marriage was and is much lower.[135] Despite this acknowledgment, the Amendments remain in force.

One example of the companionship requirement under immigration law is found in *Chand v. INS*.[136] Deciding that the marriage at issue was not entered into in good faith, the court relied on the fact that the couple did not see each other for eleven months after the wedding.[137] Similarly, in *Gamboa-Garibay v. INS*,[138] the court found a marriage to be fraudulent, in part, because a spouse could not provide any documents of shared residence.[139] In *Gamboa-Garibay*, the court also considered the fact that a witness who often visited the couple could not give specific details about what the couple did together during the these visits.[140] The court reached its conclusion by disregarding the testimony of numerous witnesses who testified on the petitioner's behalf as lacking credibility.[141]

Juxtaposing the INS amendments with DOMA illustrates the different and contradictory federal approaches to marriage. DOMA accepts without question the marriage of a man and a woman (both presumed to be heterosexual) as a basis for social and legal entitlements. A couple need do nothing more than present their opposite sex composition to a court of law[142] to obtain legal recognition as a valid marriage.[143] Even that

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133. H.R. REP. NO. 99–906, at 1, 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5978, 5978. Congress hoped to curtail such fraud while also supporting and encouraging the policy of family unification. Immigrant spouses are given special consideration under our immigration laws in order to achieve such a policy. This special policy, according to Congress, led to abuse and fraud when used by immigrants who married solely to obtain United States citizenship or residency. *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. 5978, 5978.

134. *Id.* Congress adopted this statistic as one basis for enacting the Amendments.

135. *See* Michelle J. Anderson, Note, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1411 n.60 (1993) (stating that one of the highest rates of "marriage fraud," according to the INS, is approximately 15 percent in the Los Angeles area but that the INS estimates an average percentage closer to 8 percent). The Amendments primarily burden female immigrants and have been amended to include waivers for battered women. *See generally id.* (examining the effect of the INS amendments and subsequent regulations on immigrant women).

136. No. 96–70901, 1997 WL 415348 (9th Cir. July 24, 1997).

137. *Chand*, 1997 WL 415348, at *1.

138. No. 94–3399, 1995 WL 568347 (7th Cir. Sept. 20, 1995).

139. *Gamboa-Garibay*, 1995 WL 568347, at *3.

140. *Id.*

141. *Id.* In another case, *Chungong v. INS*, the court mentioned as noteworthy that although a party could supply a legal marriage certificate, the party could not produce any photographs or invitations of the event. No. 96–2103, 1997 WL 295628, at *2 (4th Cir. June 4, 1997).

142. Presuming of course that the union was appropriately solemnized and registered.

143. An annulment, however, is always an option for a party to a marriage who has evidence the marriage was not a valid one. *See* discussion *supra* Part I.B.2.a.

declaration is not necessary in most circumstances since opposite-sex couples usually just claim their marital status on hospital, tax, estate, or other forms. In contrast, due to congressional concerns about marriage fraud, immigration laws require much more than mere opposite sex unions to form valid marriages. INS representatives are allowed to ask applicants about their companionship, and even their sexual orientation to determine the validity of a marriage.[144]

For purposes of federal law, different regulations of marriage apply. Under DOMA, when two opposite sex persons unite, there is not contemplation of fraud. A man and a woman who are legal residents or citizens in this country could arrive at the justice of the peace, declare that they do not love one another and their sole intention is to get financial perks, and still receive approval from the state.[145] A bisexual could similarly arrive at the courthouse with an opposite sex spouse, denounce heterosexuality, pledge to live in an open manner as a bisexual, but nonetheless receive legal recognition and financial benefits based solely on the genital match at the altar.[146]

Why then does federal law codify this inconsistency? One possibility is xenophobia. The disparate treatment of immigrants manifests not only in the marriage context but also in welfare laws[147] and educational systems.[148] A second possible explanation for the different approaches to marriage is that heightened romantic or companionship requirements for immigrants provide assurance that the immigrant also has a source of financial support, and is, therefore, at a lower risk for burdening the government, or becoming a "public charge." However, this argument could actually work in the converse; once individuals marry, even if their marriage lacks commitment or romance, they are entitled to a wide range of economic support from their spouse, including fair property division, support, and maintenance. This fact might encourage, rather than discourage, a lower threshold for legitimacy, so as to guarantee a source of support. A third possible explanation is that the IMFA grants immigrants

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144. *See, e.g.*, Garcia-Jaramillo v. INS, 604 F.2d 1236, 1239 (9th Cir. 1979) (holding that testimony offered at a deportation about an immigrant's homosexuality in an attempt to determine the legitimacy of his marriage was not prejudicial).

145. *See* Henderson v. Ressor, 126 S.W. 203, 208–09 (Mo. 1910). *But see* Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY: A REVIEW OF LESBIAN & GAY ISSUES 97, 98 (1991) (finding that legally married couples do not always enjoy financial benefits, specifically they have faced some tax burdens such as the "marriage penalty").

146. *See supra* Part I.B.2.

147. *See* 8 U.S.C.A. § 1613 (West Supp. 1998) (prohibiting legal immigrants, with few exceptions, from receiving means-tested public benefits for five years after their entry into the United States). Congress also stated that legal immigrants should "not depend on public resources to meet their needs." *Id.* § 1601(2)(A).

148. *See generally* Alaine Patti-Jelsvik, Note & Comment, *Re-educating the Court: Proposition 187 and the Deprivation of Education to Undocumented Immigrants*, 18 WHITTIER L. REV. 701 (1997) (discussing the components of Proposition 187, one of which denied undocumented immigrant children elementary and secondary public education access).

a benefit, rather than punishes them. This argument rests on the fact that immigrants usually do not receive any type of conditional residency or expedited review, except in the marriage context. While this argument frames the treatment accorded to immigrants as positive or privileged because their petitions receive expedited review if they are married, the reality still exists that compared to legal residents and citizens, immigrants must fulfill heightened and additional requirements in order for their unions to be recognized as legally valid and deserving of financial and societal privilege.

The divergent congressional approaches to regulating marriage complicate the questions regarding marriage regulation and merit further discussion. The IMFA focus on companionship in marriage, however, does not invalidate this Note's conclusion about PVP in marriage due to the unique nature of the immigration context.[149]

## III. THE MISCHARACTERIZATION OF THE PVP NATURE OF MARRIAGE

The previous discussion illustrates that legal marriage depends upon actual or potential penis-vagina penetration. As the UMDA and transgender cases show, neither sexual orientation nor love nor companionship matters for most marriage regulation. The *Woy* court, for example, treated a bisexual as heterosexual as long as she engaged in PVP. Under that court's approach, as long as a person is willing to engage in PVP, the PVP relationship (marriage) will be recognized, notwithstanding the spouse's non-heterosexual sexual orientation. *Woy*, then, could be interpreted as furthering heterosexist principles by treating opposite-sexed bisexuals more favorably than gays or lesbians. More fundamentally, the court overlooked sexual orientation altogether. The court based its decision not on the sexual orientation of the parties, but on their capacity for PVP.

The transgender cases similarly illustrate that legal marriage depends on conduct (PVP) rather than heterosexual status. The transgender individuals in these cases were never questioned about their sexual orientation. Instead, their ability to marry rested on their physical ability to perform one particular sex-act: PVP. Finally, Congress articulated the opposite sex requirement for marriage in DOMA, which fronts for the ability to consummate a union, i.e., engage in PVP.

Notwithstanding the doctrine that dictates that legal marriage depends on sexual conduct—PVP—the courts and Congress attempt to characterize marriage as status-based. The following discussion explores two reasons for the mischaracterization of marriage as status-based. First, the mischaracterization serves to reify and elevate heterosexual identity.

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149. The unique nature is one of a "marriage-plus" situation. *See supra* notes 121–22.

Second, the mischaracterization perpetuates the exclusivity of the institution of marriage.

### A. *How Courts and Congress Mischaracterize Marriage as Status-Based*

Congress mischaracterizes marriage as status-based by equating the opposite sex requirement—shown earlier to be the PVP requirement—with heterosexual status, stating "society has made the eminently sensible judgment to permit *heterosexuals* to marry."[150] The institution of marriage also gets characterized as status-based when the participation of bisexuals in the institution is ignored and dismissed. In other words, marriage can only be characterized as heterosexual by dismissing the reality that bisexuals legally marry.[151]

In a related context, Janet Halley states: "*Not knowing* what sodomy is, *not naming* it at all, *not describing* it accurately, *not acknowledging* its presence, are all important parts of its historical profile. Obscurity is part of what sodomy is, a means by which it attains its social effects."[152] The same can be said about bisexuality in the context of legal marriage. Bisexual invisibility perpetuates the myth that marriage is exclusively heterosexual and based on status rather than sexual conduct.

By not acknowledging bisexuality, legal marriage can be constructed as purely heterosexual. A nuanced understanding of the bisexual identity,[153] therefore, exposes the institution of legal marriage as one that includes various sexual orientations. In essence, acknowledging that identity bisexuals remain bisexual notwithstanding their participation in a legal marriage reveals that legal marriage includes multiple sexual orientations.

Failing to acknowledge bisexuals as active participants in legal marriage also perpetuates the myth and conservative ideal that legal marriage consists of two heterosexual partners. DOMA's legislative history reveals not only a lack of acknowledgment, but a labored attempt to construct and present legal marriage as an exclusive union of two heterosexuals. For example, Congress presents DOMA as a "*heterosexual-only* marriage law."[154] This "heterosexual" myth excludes gays and lesbians from the institution. By being constructed as exclusively heterosexual, the institution self-perpetuates as exclusively heterosexual. For example,

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150. H.R. REP. NO. 104–664, at 14 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2918 (emphasis added).

151. Just as Sedgwick argues the open secret of the closet has been central to the definition of modern Western thought, the open secret of bisexuality has been central to the construction of legal marriage. *See* Sedgwick, *supra* note 48, at 48–49. The open secret is this: bisexuals exist and exist in both heterosexual and homosexual communities (as well as bisexual communities). The participation of bisexuals in heterosexual communities, while known, remains unnamed and unanalyzed.

152. Halley, *supra* note 58, at 1757.

153. *See supra* Part I.B.1.

154. H.R. REP. NO. 104–664, at 16, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2920 (emphasis added) (stating that DOMA adheres to the moral teachings of heterosexual-only marriage).

the law constructs marriage to be *about* heterosexuals. Because it is *about* heterosexuals, it is thereby only *for* heterosexuals.[155] Halley explains how sodomy similarly conflates status and conduct: "'[H]omosexual sodomy' has become homosexuals as sodomy."[156] Under the legal institution of marriage, "heterosexual marriage" has, similarly, become "marriage as heterosexuals." When one considers that bisexuals enter the institution, however, it becomes apparent that the current institution of marriage is not only *about* heterosexuals but also about bisexuals.[157] The institution instead turns on the present or future acts of PVP, not the sexual orientation status of the spouses.

Admittedly status and conduct cannot be cleanly separated as if distinct aspects of a person. Status can implicate conduct and vice versa: the two are co-constitutive. A wealth of rich scholarship explores the complexities of the relationship between status and conduct.[158] Most relevant for the purposes of this Note is why the institution of marriage is socially and legally constructed as status-based, specifically as heterosexual.[159]

### B. *Why Marriage Is Mischaracterized As Status-Based*

Strategically characterizing legal marriage as based on heterosexual status serves a purpose. As Janet Halley argues, deconstructing like characterizations "exposes the political nature of that equivocation."[160] In other words, Congress and courts further a political purpose by erroneously equating PVP conduct with heterosexual orientation. First, the characterization perpetuates the myth that marriage is inherently or traditionally for heterosexuals—not gays and lesbians.[161] This equation is intimately tied to both sexism and heterosexism:

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155. This is the definitional approach used to fence out gays and lesbians from marriage. *See* Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (using definitional approach to uphold denial of marriage license to two males). *Singer* defines marriage as the union between a man and a woman. *Singer*, 522 P.2d at 1191–92. Thus, because the union is only *about* men and women it can only be *for* men and women. William Eskridge found that this is the most common articulated approach for the defense of opposite-sex marriage. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1427–28 (1993).

156. Halley, *supra* note 58, at 1734.

157. *See generally* BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT (Loraine Hutchins & Lani Kaahumanu eds., 1991) (presenting personal anecdotes of married bisexuals).

158. *See, e.g.*, Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993); Halley, *supra* note 58; Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381 (1994).

159. The point I am arguing here is not that classification based upon acts is bad, undesirable, or harmful *per se*. In fact, classifying based upon acts promises to offer opportunities for liberation and equality. *See* Halley, *supra* note 58; Mezey, *supra* note 55. What this Note argues is that the *type* of conduct—PVP—that marriage depends upon is unprincipled and illegitimate.

160. Halley, *supra* note 58, at 1733.

161. William Eskridge found that "[t]he main argument against same-sex marriage is definitional: marriage is necessarily different-sex, and therefore cannot include same-sex couples." *See* Eskridge, *supra* note 155, at 1427. Congress uses this definitional argument to further argue that

> For efficient subordination, what's wanted is that the structure not appear to be a cultural artifact kept in place by human decision or custom, but that it appear *natural*—that it appear to be a quite direct consequence of facts about the beast which are beyond the scope of human manipulation or revision. It must seem natural that individuals of the one category are dominated by individuals of the other and that as groups, the one dominates the other.[162]

Since marriage is constructed as crucial to social ordering, it is essential for equivocation to occur. This equivocation legitimizes the social privileges afforded to heterosexuals in other contexts. For example, sexual regulations harken back to traditional notions of morality and appropriate intimacy,[163] the very notions that create and perpetuate the current institution of marriage. Thus, without such equivocation, the privileged nature of the heterosexual orientation in other contexts may be called into question.[164] In essence, if courts and Congress were clear that sexual orientation fails to matter in marriage, then it could be argued that orientation should not form the basis for discrimination in other contexts.

In addition, equating heterosexual identity with sex acts illustrates the permeability and fluidity of the heterosexual status. Instead of constituting a coherent status with essential attributes and characteristics that justify the granting of legal subjectivity, heterosexuality depends upon the union of opposite sets of genitalia, and nothing more. In recognizing legal unions, the law does not care about who each partner had partnered with, who they will partner with, or how they will order their intimate relationship and how this constructs or impacts identity.[165] All the law

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marriage is exclusively for heterosexuals by equating opposite-sex with heterosexual. *See* H.R. REP. NO. 104–664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

162. MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 34 (1983) (citing Paulo Freire's writings as the genesis for such a theory).

163. *See generally* Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996) and 28 U.S.C.A. § 1738C (West Supp. 1998)); Bowers v. Hardwick, 478 U.S. 186 (1986) (utilizing, in part, the "ancient roots" of proscriptions against sodomy to uphold anti-sodomy statute); H.R. REP. NO. 104–664, at 12–18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916–22 (setting forth governmental interests advanced by DOMA).

164. One obvious context is the military, wherein pronounced heterosexuals receive preferential treatment. *See* 10 U.S.C. § 654 (1994). Even though the "Don't Ask, Don't Tell" policy does not per se exclude gays, lesbians, and bisexuals from the military (instead it prohibits "homosexual conduct"), those thought to be non-heterosexual must prove that they do not possess the propensity to engage in homosexual acts. Heterosexuals obviously receive preferential treatment in almost every other societal context as well, except where there are laws prohibiting against anti-gay discrimination. *See, e.g.*, MINN. STAT. §§ 363.02–.03 (West Supp. 1997) (prohibiting discrimination against gays, lesbians, bisexuals, and transgendered individuals).

165. This is not to say that the law does not involve itself with the marriage institution once it is formed. In fact, most states, for example, impose a duty of support on spouses. *See generally* Amy C. Christian, *Joint and Several Liability and the Joint Return: Its Implications for Women*, 66 U. CIN. L. REV. 535, 617 n.75 (1998) (discussing the varied obligations of spouses regarding property and support). Also, states regulate divorce which necessarily involves a state determination as to the continued legal viability of a union. An in-depth discussion of divorce law is beyond the scope of this Note. Moreover, this Note seeks, instead, to investigate the legal rationales and rules for allowing certain unions to access the marital privilege.

cares about is "what" one can do with specific genitalia. This reveals that there is nothing particularly elevated or sacred or socially beneficial about heterosexual marriage, unless one says that PVP is essential to social organization.

Constructing marriage as a purely heterosexual (status based) institution instead of based upon a particular type of sexual conduct (PVP) legitimizes privileges afforded to those just because they assert the status heterosexual. In essence, the construction of legal marriage as an institution based on heterosexual status serves not to *describe* the institution but instead to *prescribe* privileged treatment for those who claim the identity in society. This analysis shows the incoherence of fencing out gays and lesbians based upon a status based ideal because, as shown, marriage is not status-based. Instead, the institution is based upon the capacity for PVP which is curious, and, as shown next, illegitimate.

## IV. PVP IS AN ILLEGITIMATE BASIS FOR CONFERRING MARRIAGE BENEFITS

Determining legal marriage benefits on the capacity for PVP is an illegitimate basis for providing state marital benefits.[166] The PVP requirement perpetuates heteropatriarchy[167] and subordinates both women and sexual minorities. The PVP requirement subordinates women because it reifies and encourages traditional gender roles (as symbolized through the PVP sex act). One traditional gender role being reified and encouraged is that it is appropriate (or natural) for men and women to have sex with the opposite sex but not the same sex. If a woman or man is not able or willing to perform this act then they are not a proper (or true) woman or man. Requiring PVP for legal marriage encourages and assures that traditional sex and gender roles will be continued. The first and most fundamental of these roles is either penetrating or being penetrated by the opposite sex. Thus, a proper woman for the purposes of marriage is a person who can be penetrated by a penis. A proper man is the person who can penetrate the vagina.

Andrew Koppelman has argued that laws which discriminate against gays and lesbians reinforce male hierarchy, thereby oppressing women.[168] Koppelman argued, as have many writers and scholars,[169] that

166. Congress appears to implicitly agree that determining national policy on the basis of the sexual act of PVP was illegitimate by the omission of any mention of such a requirement. Although the omission also serves the purpose of legitimating the status of heterosexual, see *supra* notes 153–57 and accompanying text, it also is a clear indictment of the illegitimacy of such a position. This is further proven true because Congress relied on three rationales relating to sexual orientation and marriage for DOMA, none of which were rational, true, or logical. *See* discussion *supra* Part I.B.2.b.

167. *See* Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender, & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 162, 168–70 (1996).

168. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 198 (1994).

169. *See, e.g.*, SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM (1988).

the taboo against homosexuality is virtually synonymous with the taboo against "sex-inappropriateness."[170] The taboo against homosexuality, thus, re-enforces traditional sex roles. This taboo, explains Koppelman, "assumes the hierarchical significance of sexual intercourse and the polluted status of the penetrated person."[171] Koppelman arrived at this conclusion based upon the similarities between the taboo against miscegenation and the taboo against homosexuality. Koppelman has shown that the miscegenation taboo presumed that penetration possessed hierarchical significance, with whites dominating blacks and men dominating women.[172] Penetration signifies power; thus, being penetrated signifies powerlessness. Disallowing mixed race marriage protected whites from being penetrated by those who threatened the power structure. The ban on same sex marriage, then, protects men from being penetrated by other men. This legal scheme prevents men from inhabiting the place of the polluted and protects men's status as the penetrator and powerful. In essence, based on the homosexuality taboo, many segments of society refuse to tolerate sodomy because the penetration of a man reduces "men" or "maleness" to the same polluted status as woman or female. Koppelman further states:

> Implicit in [the] taboo are the premises—incompatible with equal concern and respect for all citizens—that sexual penetration is a nasty degrading violation of the self, and that there are some people (in the case of the homosexuality taboo, women) to whom, because of their inferior social status it is acceptable to do it . . . .[173]

In the marriage relationship, women necessarily occupy the polluted position of the penetrated. This is so because legal marriage requires PVP. Men then occupy an elevated position and women occupy a subordinate position. Being penetrated also means any number of subordinating consequences. These consequences have been documented in case law,[174] journal articles,[175] and social science materials.[176] Some of these consequences include the unequal division of labor in the home,[177] the degree to which men are not held accountable for domestic violence and

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170. Koppelman, *supra* note 168, at 235.

171. *Id.*

172. *Id.* at 224.

173. *Id.* at 236.

174. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment that restricted Medicaid funds for medically necessary abortions).

175. *See, e.g.*, Koppelman, *supra* note 168, 224.

176. *See, e.g.*, JOHN STOLTENBERG, REFUSING TO BE A MAN 91–100 (1989) (discussing and documenting, as far back as the early eighties, the numerosity and consequences for women of unplanned or unwanted pregnancies including financial hardship, lack of choice for abortions, and lack of support from male partners for electing an abortion).

177. *See* Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1915 n.61 (1994) (citing numerous findings that women perform a disproportionate share of the household work).

marital rape,[178] and the financial ruin many women face upon the dissolution of the union.[179]

Adrienne Rich also discusses the institution of heteropatriarchy and urges that heterosexuality be recognized as a "political institution."[180] According to Rich, heterosexuality is such an institution because of the many forces which discourage women from associating with other women (both socially and erotically) and possessing women-identified values.[181] Thus, if not for the overwhelming number of forces that either punish women for being without a man or make it difficult or near impossible for women to be without a man, women would more fully realize their connection to or desire for other women.

While Rich's theory can be criticized on many fronts, particularly for essentializing women in general and more specifically lesbians,[182] it provides a helpful context within which the PVP requirement can be understood. Allowing only opposite sexed couples to marry by itself works as a force to encourage male and female coupling.[183] Rich states that a "woman seeking to escape disadvantage may well turn to marriage as a form of hoped for protection."[184] However, the PVP requirement does even more; it perpetuates heteropatriarchy by providing financial incentives to women to be penetrated by men. As discussed above, this state sponsored penetration invokes and perpetuates the subordination of women.[185]

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178. *See* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 574 (1997) (finding that marital rape is still legal in one state and treated less seriously than stranger assault); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1193 (1994) (discussing the role and limitations of the state in assisting women, including women who are victims of domestic violence).

179. *See* Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998).

180. Rich, *supra* note 105, at 232 (emphasis omitted).

181. *Id.* at 232–34. Some of the forces which discourage women's identification with other women but that support male power include: sexual terrorism (including rape and sexual harassment), domestic violence, abortion and contraception laws, lack of compensation for work in the home, and non and substandard education of women. *Id.* at 233.

182. Rich could be said to essentialize lesbians or lesbian desire as political. "[W]e may first begin to perceive [lesbian existence] as a form of naysaying to patriarchy, an act of resistance." *Id.* at 239.

183. Congress agrees, although as previously discussed mistakenly focuses on the sexual orientation instead of genitalia. *See supra* discussion Part I.B.2.b.

184. Rich, *supra* note 105, at 235.

185. I am not attempting to argue here that PVP is inherently oppressive for women. I could not in good faith argue this position for this would minimize the pleasurable sexual aspect of such an act for women, both heterosexual and opposite-sexed bisexual. I am not attempting to align myself with writers like Andrea Dworkin who have argued that penetration of any kind is inherently oppressive. *See* ANDREA DWORKIN, INTERCOURSE 63–67, 122–23 (1987). Instead, I am calling into question the governmental practice and custom of focusing on this act as a basis for recognizing legal unions. For despite the sex positive outlooks on PVP, it carries with it a history and social significance in the law. Thus, I call into question the central place PVP occupies in marriage law.

Additionally, PVP is an illegitimate basis to determine governmental benefits because it is based on certain sexual activity. The PVP-based marriage requirement reduces the marriage participants to sexual actors and objects. Men and women receive recognition and benefits for what they can do in bed, rather than what they actually do with the rest of their lives in their relationship. For performing the requisite sex act, PVP, the government confers numerous and abundant financial benefits.[186] Spouses also receive social benefits. Because legal marriage has nothing to do with companionship and love, none of these benefits has anything to do with love or companionship. Instead, these benefits reward those who can engage in PVP.

An irony lurks here. Marriage law elevates, reveres, and encourages one type of sexual conduct (PVP) while characterizing the institution to be comprised of exclusively those with a heterosexual sexual orientation. Thus, marriage law contributes to the construction of the heterosexual identity as equivalent to PVP.[187] Unlike heterosexuals, however, marginalized groups must devote a considerable amount of time debunking the myth that they are hypersexual.[188] Without such defense, these groups are at risk for perpetual vilification and misunderstanding. This objectification significantly impacts marginalized groups in the law by creating bias and prejudice. For example, the myth that gay male identity is defined by sex informed the Justices who decided the anti-gay case of *Bowers v. Hardwick*.[189]

On the one hand, then, heterosexuals' benefits depend on PVP while courts simultaneously refuse protections or privileges for gays and lesbians due to the characterization, albeit inaccurate and unfounded, that gays and lesbians are all about sexual conduct. Thus, marriage law creates a double standard for gays and lesbians. This double standard is an illegitimate basis to fence out gays and lesbians from marriage. The judiciary and government cannot justify basing an entire legal scheme of financial benefits and burdens, and societal rights and responsibilities, on sexual conduct, penis-vagina penetration, which implicates an entire history and future of the subordination of so many,[190] while simultane-

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186. *See supra* note 106.

187. Admittedly, marriage is not the only societal force that defines the heterosexual identity. *See* Susan Sterett, *Husbands & Wives, Dangerousness & Dependence: Public Pensions in the 1860s–1920s*, 75 DENV. U. L. REV. 1181 (1998) (arguing that pension benefits given to widows were instrumental in creating the heterosexual identity).

188. *See generally* Halley, *supra* note 58 (deconstructing the equivocation of gay and sodomy); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1437–45 (1991) (explaining that one prevalent image of slave women, perpetuated today, is of the Jezebel, or "a woman governed by her sexual desires").

189. 478 U.S. 186, 192 (1986) ("It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots."); *see* Halley, *supra* note 58.

190. By exposing the unprincipled nature of the PVP requirement, this Note risks prompting reform that takes an even more punitive and discriminatory position against gays, lesbians,

ously refusing legal protections to gays and lesbians because of their erroneous conflation with sexual conduct.

## CONCLUSION

The transgender marriage cases, the UMDA, and DOMA reveal that formal, legal marriage does not require or even consider love, companionship, commitment, or sexual orientation. Instead, marriage depends on sexual conduct, specifically the act of penis-vagina penetration. Despite the PVP (act-based) nature of marriage, Congress and the courts characterize marriage as status-based, which works to further reify the institution and heterosexual orientation itself. One way this is done is by ignoring or dismissing the participation of bisexuals in legal marriage. This act-based requirement is an incoherent and illegitimate basis for granting governmental benefits because it perpetuates the subordination of marginalized groups and creates a double standard for gays and lesbians. Also, it is dubious at best to have a central social, political, and cultural institution turn on a particular sex act.

Bisexuals occupy a unique position in queer theory, being stealth interlopers into the institution of marriage and exposing the disingenuous and illusory nature of the rationales that are used to construct the institution as exclusively by and for heterosexuals. DOMA and the UMDA are not explicit about this act-based understanding of marriage; bisexuals are uniquely situated to expose the PVP requirement in these contexts. This analysis reveals the progressive potential of theorizing around bisexuality. This Note reveals that legal doctrine looks to the capacity for PVP as determinative of marital eligibility, surely an illegitimate requirement for the plethora of benefits attached to marriage. Moreover, it shows the progressive potential of theorizing around bisexuality. Future incorporations of bisexuality in queer theory offer further opportunity to deconstruct and reconstruct legal regimes.

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transgendered individuals, opposite-sexed bisexuals, and women. This is always a risk, however, when advocating for change. The goal of this Note is to expose the true illegitimate nature of present marriage law with the hopes that future scholarship will continue to propose legitimate and inclusive alternatives.

# AFTERWORD

# BEYOND SEXUAL ORIENTATION IN QUEER LEGAL THEORY: MAJORITARIANISM, MULTIDIMENSIONALITY, AND RESPONSIBILITY IN SOCIAL JUSTICE SCHOLARSHIP

# OR

# LEGAL SCHOLARS AS CULTURAL WARRIORS

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* Professor of Law, University of Miami. I thank the editors, organizers and participants of the InterSEXionality Symposium sponsored by the University of Denver College of Law and the *Denver University Law Review* for the opportunity to engage the issues addressed in this Afterword, and through the works that preceded it. In particular, I thank Martha Ertman, Roberto Corrada, Nancy Ehenreich, Julie Nice, Karla Robertson and Kent Modesitt. I thank also Adrienne Davis and all the participants of the legal theory faculty workshop at American University Washington College of Law for helpful comments, especially Ann Shalleck, Joan Williams, Elliott Milstein and Peter Cicchino. In addition, I thank Tony Alfieri, Keith Aoki, Elvia Arriola, Margalynne Armstrong, Chris Cameron, Devon Carbado, Bob Chang, Sumi Cho, Barb Cox, Jerome Culp, Harlon Dalton, Jennifer Elrod, Leslie Espinoza, Anthony Farley, Clark Freshman, Neal Gotanda, Angela Harris, Phoebe Haddon, Berta Hernandez-Truyol, Lisa Iglesias, Peter Kwan, Gerry Lopez, Margaret Montoya, Kevin Johnson, Rachel Moran, Viki Ortiz, Stephanie Phillips, Jonathan Simon, Kendall Thomas, Gerald Torres, Leti Volpp, Robert Westley, Stephanie Wildman and Eric Yamamoto for conversations and insights that underlie, and helped to bring together in my mind, the social and jurisprudential themes joined below. All errors are mine.

## INTRODUCTION

In this Afterword I situate this symposium against the past and present landscape of sexual orientation legal scholarship, seeking thereby to draw observations and arguments about the future of this field. Rather than focus on the preceding articles,[1] I juxtapose events of special significance to sexual orientation legal scholarship that have transpired since the founding of this discourse in a 1979 symposium by the *Hastings Law Journal*.[2] In particular, I consider three phenomena that came about immediately after, or since, the commencement of this field: (1) the contemporaneous emergence of critical race theory and postmodern methods of outsider jurisprudence during those same years; (2) the articulation of Queer[3] consciousness and activism at basically the same time; and (3) the onset, spread and impact of majoritarian cultural war. These developments, I argue, require sexual minority legal scholars to go beyond sexual orientation in the search for social and legal equality.

This Afterword also celebrates the remarkable coincidence that in a single year two symposia on sexual orientation and "intersexionality" were conceived, planned and held independently of each other.[4] This coincidence is remarkable because sexual orientation scholarship never before had witnessed any such effort—any programmatic effort to assess features of identity other than sexual orientation to evaluate how law affects this nation's multiply diverse sexual minorities.[5] Despite individ-

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1. The Foreword provides a more complete summary of the symposium articles. *See* Julie A. Nice, *Foreword: InterSEXionality and the Strategy Question*, 75 DENV. U. L. REV. 1131 (1998).

2. *See Sexual Preference and Gender Identity: A Symposium*, 30 HASTINGS L.J. 799 (1979).

3. I adopt the capital "Q" to underscore distinction with, and distance from, the "queer" as homophobic pejorative. The move to capitalize "Queer" responds to concerns over continuing associations with "queer's" disgraceful and traumatizing past. By distinguishing Queer from queer in this way, the move to capitalize invokes the shame of heterosexism while also underscoring that the refashioned term represents a willful act of sexual minority self-determination—an act taken through discursive reclamation and redeployment of the loaded term specifically and consciously on antisubordination terms. *See* Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 346–50 (1995).

4. *See* Symposium, *InterSEXionality: Interdisciplinary Perspectives on Queering Legal Theory*, 75 DENV. U. L. REV. 1129 (1998); Symposium, *Intersexions: The Legal and Social Construction of Sexual Orientation*, 48 HASTINGS L.J. 1101 (1997). Although the Denver symposium took place in February 1998, it was planned and assembled during 1997.

5. By "sexual minorities" I mean to highlight the diversity as well as the commonality of lesbians, bisexuals, the trans/bi-gendered and gay men. It is plain that "differences" exist across these various "sexual minority" populations. It also is plain that differences exist within these subgroups. Without disturbing recognition of those differences, or implying a false essentialism, it also is plain that commonalities exist within and across these subgroups on the basis of mistreatment due to the interplay of sex, gender and sexual orientation. Social and legal mistreatment on the basis of this complex interplay is the continuity that makes it coherent to approach these multiply diverse subgroups as a unit of social and legal analysis. Without reifying that mistreatment, the term "sexual minority" signifies a level of generality in the analysis of so-called "sexual aberrations" that is well grounded in the social circumstances and legal classifications established by the current preferences

ual or sporadic efforts to go beyond sexual orientation in gay and lesbian scholarship,[6] prior to 1997 critical legal inquiry into the condition of multiply diverse sexual minorities remained fixed substantially on "sexual orientation" as a unidimensional unit of critical legal analysis. This coincidence is made even more remarkable by two other developments of the same year.

Though not the focus of this Afterword, 1997 brought forth a program on sexual orientation, race and ethnicity during the annual meeting of the American Association of Law Schools.[7] That program, also a first, was sponsored jointly by the Association's Section on Gay and Lesbian Legal Issues and Section on Minority Groups in response to the lack of expansive critical analysis of the complex social and legal conditions that disempower sexual minorities legally, and that disadvantage us socially. That same year, an "internal racial critique" of gay and lesbian legal scholarship also emerged in full force.[8] This critique documented in compelling detail the absence of multidimensional analysis in sexual orientation legal scholarship, and persuasively explained the detrimental consequences of that absence.[9] In each instance, these developments have been overdue steps needed to secure the continuing development of sexual orientation discourse as a field of legal scholarship relevant to social life. This symposium and its 1997 counterparts, therefore, are a most welcome sign of this field's continuing vitality.

However, this vitality also means that scholars in this field must confront complex and difficult issues of identification, majoritarianism and responsibility in the advancement of antisubordination goals through critical legal scholarship. These issues stem in part from the need for solidarity and the fact of diversity within and among traditionally subor-

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or practices of majoritarian dominance—circumstances and classifications whose structuring we must discern as we inspect and endeavor to dismantle them. *See* Valdes, *supra* note 3.

6. *See, e.g.*, RUTH COLKER, HYDBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996) (examining the complexity of identiy intermixture across various sociolegal categories); Isabelle R. Gunning, *Stories from Home: Tales from the Intersection of Race, Gender and Sexual Orientation*, 5 S. CAL. REV. L. & WOMEN'S STUD. 143 (1995) (recounting personal and general encounters with Eurocentrism in lesbian venues or discourses); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995) (comparing and contrasting constructions of personal and community identities based on race and sexual orientation); Cynthia Petersen, *Envisioning a Lesbian Equality Jurisprudence*, *in* LEGAL INVERSIONS: LESBIANS, GAY MEN, AND THE POLITICS OF LAW 118 (Didi Herman & Carl Stychin eds., 1995) (arguing that lesbian legal theory must be intersectional because lesbian subordination is multifaceted); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 LAW & SEXUALITY 83 (1994) (questioning the benefits of lesbian and gay liberation to lesbians and gays who are of color, and/or poor, and/or trans/bi-gendered).

7. This program, titled "Race, Ethnicity and Sexual Orientation: Crossing New Intersections in Law and Scholarship," was held on January 9, 1998 during the Association's annual meeting in San Francisco, California.

8. *See, e.g.*, Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).

9. *See id.* at 567–635.

dinated outgroups. As experience to date illustrates, the development of frameworks to embrace diversity and induce solidarity within and across outgroups is a difficult and delicate task.[10] Antisubordination progress therefore always will be uncertain, perhaps sometimes impossible. But as critical legal scholars devoted to the achievement of social justice for sexual minorities and other disempowered outgroups, we cannot evade the role we can play as legal scholars in a legalistic society.[11]

The importance of immediate context bears stress at the outset because it underlies the analysis pursued in this Afterword: to make a difference in legal culture and throughout society, antisubordination scholars must come to understand today's penchant for backlash lawmaking through cultural warfare as a continuing and concerted act of domination and subordination. Today's "cultural war" is a phenomenon that very much affects contemporary law and lawmaking in a society wedded to "government by law" and justified by the belief that its laws are presumptively just—and hence, justified—precisely because they are formally "democratic."[12] Yet the version of "democracy" that predominates in this country accommodates subordination through cultural war and backlash lawmaking because it valorizes and enforces majority self-interest, even while it problematizes majoritarian power when it verges on a formal, as opposed to a functional, form of cultural supremacy.[13]

In a close call, and on other occasions, prevalent forms of majoritarianism strongly caution against the use of judicial power to upset the arrangements put in place by those able to dominate the political

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10. *See generally* Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 2–7 (1996) (outlining ousider experiments and experiences with diversity and community through critical legal theory).

11. By "legalistic" I mean simply a society that is highly devoted to "the rule of law" and that highly touts "equal justice under law." Without doubt, in this sense, this society is highly legalistic. *See generally* MARY ANN GLENDON, A NATION UNDER LAWYERS (1994) (discussing the legalistic spirit that has long been a hallmark of America's identity).

12. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (discussing the long-standing dispute in constitutional theory over the scope of judicial review).

13. The standard rule is that courts should defer to legislative majoritarianism unless a "suspect" classification is deemed to be involved in state action or unless state action impinges upon a "fundamental" interest. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 374–80 (4th ed. 1991). The purpose of this rule is to maximize majoritarianism and avoid the "countermajoritarian difficulty" that is attributed to judicial interference with majoritarian lawmaking. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962). Of course, the debate over "active" versus "restrained" exercises of judicial review is a much larger and complicated phenomenon, a full discussion of which is beyond this Afterword. For relatively recent expositions of this debate, see STEPHEN C. HALPERN & CHARLES M. LAMB, SUPREME COURT ACTIVISM AND RESTRAINT (1982); STERLING HARWOOD, JUDICIAL ACTIVISM: A RESTRAINED DEFENSE (1996). *See generally* Michael J. Klarman, *Majoritarian Judicial Review: The Retrenchment Problem*, 85 GEO. L.J. 491 (1997); Sylvia Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. (forthcoming 1999).

process.[14] This domination, both historically and presently, has constituted an essentialized form of identity-driven politics based on race, sex, religion, class, sexual orientation and other sociolegal axes.[15] Nonetheless, avoidance of the so-called "counter-majoritarian difficulty" is a venerable and continuing rationale for judicial deference even to unjust laws that favor essentialized majorities at the expense of essentialized minorities.[16] Thus, to succeed in lawmaking processes moved mostly by essentialized majoritarian self-interest, legal scholars must employ our skills and resources to imagine and help assemble collectivities with the capacity for successful participation in such lawmaking—at least until we are able to alter substantively these lawmaking dynamics. Through our scholarship and other activities, we must imagine and implement ways of mobilizing, practicing, harnessing and transcending identity politics to promote antisubordination transformation in a multicultural but majoritarian and essentialist society.[17]

This challenge, as just noted, is made acute and urgent by the resurgence of majoritarian cultural traditionalism, which followed on the heels of the 1979 symposium,[18] and continues today; since the triumph of backlash politics in the 1980 presidential election, judicial rollback of civil rights and "democratic" reconsolidation of majoritarian self-interest via legislation and referendum have become established as the political

14. A recent and especially germane example is *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Court curtsied to the "presumed belief of a majority of the electorate in Georgia," to uphold "majority sentiments about the morality of homosexuality." *Id.* at 196. Splitting 5 to 4, a bare majority held that "homosexual sodomy" did not constitute a "fundamental right," *id.* at 191–92, and then used the occasion to signal the arrival of a new era of judicial majoritarianism, warning lower courts and potential claimants that judicial discretion hence would side with majoritarian lawmaking preferences. *Cf. id.* at 194–95. Justice Powell, whose wavering switched outcomes several times during the course of the decision, finally cast the decisive vote that created a majority for that infamous ruling; ironically, several years later he publicly singled it out as a key instance of error during his time on the high bench. Anand Agneshwwar, *Powell on Sodomy: Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3. Nevertheless, that pronouncement spawned similar rulings, in which lower federal courts held that lesbians and gays do not constitute a "suspect classification" to uphold state actions in which members of the sexual majority discriminated with impunity against sexual minorities. *See, e.g.*, Padula v. Webster, 822 F.2d 97, 102–03 (D.C. Cir. 1987). For critical reviews of these and similar rulings, see Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143 (1988); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988); Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Thomas B. Stoddard, Bowers v. Hardwick, *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); John Charles Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After* Bowers v. Hardwick, 31 B.C. L. REV. 375 (1990).

15. *See infra* notes 137–41 and accompanying text.

16. *See generally* BICKEL, *supra* note 13, at 16–23 (discussing the counter-majoritarian aspects of judicial review).

17. *See generally* Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995) (proposing a "transformative approach," which, in addition to remedying individual indignities, would focus on correcting group-level injustices).

18. *See infra* notes 83–94, 101–38 and accompanying text.

norm of these times.[19] This timing is telling; it tells us that, from its moment of origin, sexual orientation scholarship has been surrounded by majoritarian cultural war and essentialized backlash lawmaking directed against sexual and other minorities who somehow have reaped "too many" rights.[20] The key linkage pressed in this Afterword therefore is the relationship between antisubordination purpose through critical legal scholarship and backlash lawmaking through cultural war.

More specifically, this Afterword focuses on the ways in which legal scholarship devoted to social justice can be made more potent and relevant through multidimensional analysis.[21] This Afterword urges multidimensional legal scholarship as a promising means toward exploring and combating how sexual and other majorities exert lawmaking power through cultural war to perpetuate essentialized structural privileges. Multidimensionality in antisubordination critiques of law and society reminds "gays" or "women" or "blacks" or "Latinas/os" that the multiply diverse members of each such group at all times help constitute and complexify all of the other groups as well. Multidimensionality thereby

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19. The norms of cultural war and backlash lawmaking have become entrenched through various elections and developments spanning the 1980s and 1990s. *See infra* Part E (discussing three lines of majoritarian backlash lawmaking). This entrenchment continues despite the 1998 midterm elections, which have been interpreted as a rebuke of the extremism of backlash zealots in the Congress; perhaps most notable among those was Speaker of the House Newt Gingrich. *See, e.g.*, Howard Fineman & Matthew Cooper, *Newt Hits the Showers*, NEWSWEEK, Nov. 16, 1998, at 30, 30. Of course, the 1998 results also were attributed more specifically to public disgust with the pursuit of the Monica Lewinsky scandal to the point of formal presidential impeachment by politicians closely affiliated with ingroup backlash. *See* Daniel Klaidman & Mark Hosenball, *The Last True Believer*, NEWSWEEK, Nov. 16, 1998, at 36, 36. Of course, this election does not undo any of the tragedies wrought already by cultural war. And despite the electorate's apparent rebuke, majoritarian cultural warfare is unlikely to abate, as evidenced by post-election calls to redouble ingroup backlash efforts: these calls argue in part that 1998's electoral rebuke was not the result of public distaste for overzealousness, but, rather, a failure to honor sufficiently the imperatives of majoritarian backlash. These calls therefore urge intensification of practices and policies, such as the rollback of civil rights, that are likely to reconsolidate ingroup privileges, which have become the hallmark of cultural war. *See, e.g*, John Leo, *GOP: Stop Running Away from Majority Opinion*, MIAMI HERALD, Nov. 9, 1998, at 11A; *see also* Steve Berg, *Simmering Preferences Controversy Nears a Boil*, STAR TRIB. (Minneapolis-St. Paul), March 12, 1995, at 1A; Amitai Etzioni, *The Spirit of "We,"* ATLANTA J. & ATLANTA CONST., Jan. 16, 1994, at G1; *Too Many "Rights,"* NEWSDAY, Dec. 15, 1991, at 43.

20. *See generally* Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (discussing recent attempts by neoconservatives and critical legal scholars to undo civil rights reforms); *see also supra* note 19 and sources cited therein. In this symposium, Karen Engle examines one aspect of this retrenchment effort, exploring the conflation of "civil rights" and "special rights" by majoritarian legislators and judges to oppose the gay rights movement and the response to this conflation by gay rights proponents. *See* Karen Engle, *What's So Special About Special Rights*, 75 DENV. U. L. REV. 1265 (1998).

21. By "multidimensional" I mean a kind of multi-intersectional analysis and discourse that attempts cognition of multiple intersections at once. *See* Hutchinson, *supra* note 8, at 640–44; *see also* Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69, 71 (1996); Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, Keynote Speech Before the Yale Law School Conference on Women of Color and the Law (April 16, 1988), *in* 14 WOMEN'S RTS. L. REP. 297, 298–300 (1992).

reminds all outgroups that *all* forms of identity hierarchy impinge on the social and legal interests of their members: biases based on race/ethnicity, sex/gender, sexual orientation and other identity features are directly relevant to each of those overlapping groups' social and legal interests because *all* of those biases impact members of *every* such group. Multidimensionality tends to promote awareness of patterns as well as particularities in social relations by studying in an interconnected way the specifics of subordination.

The emphasis throughout this Afterword on the relationship between critical legal scholarship and social justice transformation should not elide the equal importance of praxis to antisubordination method.[22] I focus on theory and scholarship in this Afterword chiefly because, as legal *scholars*, we possess a unique structural capacity for theorizing social reality and law's relationship to it: as *critical* legal scholars devoted to social justice, we have the responsibility to exercise that capacity to articulate frameworks of effective antisubordination resistance. But articulation is only the beginning; we also have a responsibility to practice and promote the lessons and insights of our scholarship. The responsibility of all social justice scholars without a doubt includes praxis.[23]

However, as with theory, praxis requires multidimensionality. And multidimensional praxis suggests that outgroup antisubordination interventions ranging from public lawyering to social activism should not be tied exclusively or simply to unidimensional essentialist formations, such as sexual orientation. Praxis—like theory and scholarship—should be cognizant of, and responsive to, the intra- and inter-group diversities and complexities addressed below with respect to theory and scholarship.

By responding to the gaps of the past in both theory and praxis, and by contributing momentum to the expansion of this scholarship at a critical juncture in its development, these twin symposia perform an invaluable service. By showcasing "intersexionality," 1997's symposia demonstrate how this scholarship can continue to mature. They invite and inspire more of the same in the years to come. Everyone associated with this field thus owes a debt of appreciation to the editors, authors and advisors of this symposium and its counterpart. In support of their efforts, the aim and purpose of this Afterword is to fortify this field of antisubordination scholarship as a key component in the continuing quest for equality, safety, justice and dignity on behalf of the multiply diverse sex-

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22. *See generally* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 828–29 (1997) (offering the beginnings of a critical race praxis to help bridge both the gap "between progressive race theory and political lawyering practice and the growing divide between law and racial justice").

23. This basic point has been well-established among RaceCrit and LatCrit scholars. *See, e.g.*, Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2248–51 (1992); Laura M. Padilla, *LatCrit Praxis to Heal Fractured Communities*, 2 HARV. LATINO L. REV. 375 (1997).

ual minorities that inhabit this nation, and that remain subordinated by its Euro-heteropatriarchal laws and norms.[24]

### A. *Sexual Minorities & Sexual Orientation Scholarship Since 1979*

In 1979 the legal academy witnessed the first-ever symposium on sexual orientation and the law.[25] Since then this field of scholarship has progressed tremendously: this scholarship decisively has interjected sexual minority concerns into the consciousness and institutions of this nation's legal culture.[26] This scholarship has articulated nonheterosexist viewpoints in doctrinal domains from constitutional to family law that have exposed the heterocentric presumptions and prejudices that permeate this society and its legal system.[27] In conjunction with the work of activists and scholars in other disciplines, this intervention gradually but certainly has established the value and legitimacy of scholarly inquiry into an aspect of human existence and sociolegal interaction that previously had been denigrated as mere prurience or deviance.

But since then, and until now, our work on its face has for the most part reduced the lives and interests of sexual minorities virtually to a single factor: apart from exploring the interconnection of sex and gender to sexual orientation,[28] our scholarship has been unidimensionally fo-

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24. By "Euro-heteropatriarchy" or "Eurocentric heteropatriarchy" I mean the white, northern European, Anglo-Saxonized fusion of androsexism and heterosexism that combines these ideologies of identity to produce, and to sustain, white, male and straight privilege in law and society. This "Eurocentric" version of "heteropatriarchy" is rooted in ancient times and cultures that are posited as the antecedents of this society. *See* Francisco Valdes, *Unpacking Hetero-patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161, 172–201 (1996). Though androsexism and heterosexism drive other societies and cultures as well, critical analysis is justifiably focused on the white and Anglo version because it is the one that predominates structurally in the society under discussion. In this particular version of heteropatriarchy, white and Anglo supremacy is a feature that distinguishes this country, for better or worse, from, say, the fusion of androsexism and heterosexism in a Spanish or Latina/o society. *See* Francisco Valdes, *Notes on the Conflation of Sex, Gender and Sexual Orientation: A QueerCrit and LatCrit Perspective*, *in* THE LATINO/A CONDITION: A CRITICAL READER 543 (Richard Delgado & Jean Stefancic eds., 1998). For further readings on the emergent field of "LatCrit" theory, see *infra* note 161.

25. *See* Symposium, *Sexual Preference and Gender Identity: A Symposium*, 30 HASTINGS L.J. 799 (1979).

26. For a critical synopsis of this field's development, see Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of "Sexual Orientation,"* 48 HASTINGS L.J. 1293 (1997).

27. *See id.* at 1301–08.

28. The work on sex and gender, and their relationship to sexual orientation, has been spearheaded by a variety of scholars. *See, e.g.*, Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33 (1995); Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (1994); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gen-*

cused on the social and legal significance of sexual orientation. Happily, this continuing exploration of sex-gender intersectionality continues in this symposium.[29] But since 1979, and until 1997, it was possible to read sexual orientation legal scholarship and walk away from that effort thinking that race, ethnicity, class, religion and other markers of identity and opportunity were marginal, if not irrelevant, to sexual minority lives.[30] It was possible, for the most part, to assume that the heterogeneous sexual minority population was comprised substantially of male, affluent WASPs; it was possible to conclude mistakenly that all was well in the lives of this nation's nonheterosexual population but for the exception of majoritarian sexual orientation bias.

This narrowed approach may be explained by developmental circumstance and other factors, including the operation of white and similar privileges in this society, well as within the legal academy and among lesbian and gay communities.[31] As a first step, this focus has been salutary because it has interjected into legal discourse a previously silenced but socially relevant community. But the discourse cannot be allowed to stall and remain there. This much has been made plain by the emergent internal critique of sexual orientation scholarship, which notes our collective failure to fan out beyond an overly simple or narrow focus on

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*der*, 144 U. PA. L. REV. 1 (1995); Valdes, *supra* note 3; I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991). This ongoing investigation is presaged in Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979), and, more recently, in Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

29. For example, Mary Anne Case, in her contribution to this symposium, continues prior explorations of sex, gender, and sexual orientation and their interaction under different cultural models. *See* Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305 (1998). Taking exception to comparative benefits I had attributed to Native American sex/gender arrangements elsewhere, Case argues that Native American arrangements at this point "would contract, not expand, our present horizons. [They] would do little more than substitute a package deal centered around gender for the one our culture has conventionally built around sex." Case, *supra*, at 1306; *see also* Valdes, *supra* note 3, at 209–300 (describing indigenous cultures' treatment of the sex/gender/sexual orientation model and comparing this to Euro-American constructs).

30. Based on the substantial analogy literature produced during those years, it also was possible to draw numerous analogies between sexual orientation and other categories of identity. *See, e.g.*, Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679 (1996) (assessing the relevant similarities and differences in the use of race and sexual orientation civil rights analogies to address the failings of each movement); Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65 (1997) (analogizing race and sexual orientation in the context of the military's anti-gay exclusion policy); Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33 (1994) (comparing and contrasting sexual and racial minority civil rights quests to urge careful and mutually beneficial coalitional projects); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994) (examining and questioning analogies and distinctions between sexual orientation and other constructs, especially as used to promote anti-gay state referenda).

31. *See* Valdes, *supra* note 26, at 1315–18.

"sexual orientation" as the singular feature of personhood that eclipses all others in the social needs and legal experiences of sexual minorities.[32]

Moreover, that unidimensional construction, even if inadvertent, obviously never was demographically precise. All along, the nation's gay and lesbian communities have been beset by racism, sexism, poverty and other blights that have yet to be engaged in a sustained and critical way either by the legal academy or the nation's governing elites.[33] By necessary consequence, the scholarship since 1979 left virtually untouched the various other features and fields of identity that impact sexual minority lives, along and in conjunction with sexual orientation.

It follows from the record of mostly unidimensional inquiry produced since 1979 that the techniques and approaches of the past are less than is needed to rectify social injustice among sexual minorities that undeniably embody multiple diversities based on the interaction of race/ethnicity, trans/nationality, class, sex/gender, dis/ability, religion and other socially or legally relevant characteristics. Though momentarily feasible as antidiscrimination method in the early moments of sexual orientation scholarship, that narrow, unidimensional approach never could be mistaken as timeless. Today, the conception and articulation of equality analyses that center sexual minorities qua sexual minorities are important but nevertheless must be understood as insufficient, especially because much has changed jurisprudentially, politically and socially since 1979, both within and beyond the legal academy. As discussed more fully below,[34] these changes commenced formally, as if by lockstep, following the 1979 sexual orientation symposium, and they continue to unfold alongside the development of this field.

### B. *Sexual Orientation, Critical Race Theory & Postmodern Analysis*

One change is the emergence and growth of outsider jurisprudence.[35] This discourse, devoted to social justice for traditionally subordinated groups, has been pioneered by women and men of color and of all sexual orientations. It offers much to sexual minority legal scholarship.

To ensure the relevance of the antiheterosexist social justice program launched in 1979, sexual minority (and other outgroup) scholars must transcend the limits of the single-axis past and embrace the jurisprudential methods and consciousness pioneered in recent years primarily by the women and men who formed the movement known as critical race

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32. *See* Hutchinson, *supra* note 8, at 583–635.

33. For critical analyses of these additional yet simultaneous afflictions, see *supra* note 6 and sources cited therein.

34. *See infra* notes 35–136 and accompanying text.

35. The term "outsider jurisprudence" was coined by Professor Mari J. Matsuda. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989).

theory. A jurisprudential formation of even more recent vintage than gay and lesbian legal scholarship, critical race theory came into existence after the 1979 symposium—about ten years after, when law students and professors joined in various settings during the late 1980s to forge that movement.[36] But in its first decade, critical race theory has registered formidable insights that now can serve sexual orientation scholarship.[37]

Dedicated principally to antiracist struggle, critical race theory in its first decade has exposed the shortcomings of civil rights legal scholarship and social reforms anchored to formal rather than substantive change.[38] In doing so, critical race theory has devised tools and techniques of analysis that sexual minority scholars now should—must—adopt and apply to move beyond the gains and limits of the past. Chief among these innovations have been multiplicity[39] and intersectionality.[40] Both multiplicity and intersectionality grapple with the complexities of individual and collective identities as a social and legal phenomenon. They both seek to curb the use of "identity" to create social hierarchies, usually with the complicity of law. These two concepts, however, also respond and contribute to larger scholarly developments that span several disciplines and that, together, travel under the name of postmodernism.

Generally, "postmodernism" is the rubric associated with a recognition that social conditions and human understanding of them are complex, contingent and contextual.[41] Postmodernism therefore resists universal or unidimensional generalization, searching instead for the shifting details of nuance and particularity. It eschews ahistorical analysis and emphasizes the specificity of situations and the fluidity of perceptions. Postmodernism doubts categorization and demands qualification. It challenges the imputation of innateness to any human phenomenon and insists on documenting and critiquing the social construction of all realities. It accepts both the concentration and the diffusion of power, and the relationship of discourse to knowledge, consciousness and power. Post-

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36. For one historical account, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT at xvii–xxviii (Kimberlé Crenshaw et al. eds., 1995). For another account, see Sumi Cho & Robert Westley, *Historicizing Critical Race Theory's Cutting Edge: Key Movements that Performed the Theory*, *in* CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS (Jerome McCristal Culp, Jr. et. al. eds., forthcoming 1999).

37. *See generally* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) (providing a collection of essays examining critical race theory).

38. *See supra* notes 36, 37 and sources cited therein.

39. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608 (1990); *see also* Matsuda, *supra* note 21.

40. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991).

41. *See generally* Anthony E. Cook, *Reflections on Postmodernism*, 26 NEW ENG. L. REV. 751 (1992) (evaluating whether progressive legal scholars can focus the philosophies of postmodernism toward the various purposes they envision).

modernism highlights the instability, indeterminacy and interplay of everything and, perhaps most of all, human identities and relations.[42]

In critical legal theory, postmodernism therefore stands in contrast to essentialism.[43] Although it describes various presumptions and practices, "essentialism" generally refers to discourses or projects that fail consciously or consistently to excavate the particularity and contingency of context and complexity in antisubordination critiques of legal relations and social hierarchies.[44] Unidimensional analyses of law and society therefore are described as essentialist while intersectional and multidimensional analyses that proceed from a postmodern perspective are described as antiessentialist.[45]

Responding to postmodern tenets, multiplicity signifies embrace of the fact that all humans embody simultaneously identities composed of multiple features, such as (but not limited to) sexual orientation, race, class and gender. Intersectionality complements multiplicity by recognizing that these multiple features interact, or intersect, in both structural and situational ways to produce multifaceted and multilayered, or multidimensional, social hierarchies. Thus, multiplicity recognizes the complexity of identities and intersectionality recognizes the concomitant complexity of power relationships based on multiplicitous identities. In tandem, these two concepts bring a postmodern and multidimensional mindset to the analysis of law, power and justice.[46]

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42. *See, e.g.*, Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 2 AFR.-AM. L. & POL'Y REP. 207, 210–11 (1995).

43. *See generally* Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687 (1996) (exploring an analytical movement from essentialism to societal positions and political relationships).

44. The tensions of essentialism and postmodernism have attracted sexual orientation scholars' attentions. *See generally* Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43 (1994) (discussing the problem of essentialism within feminist legal theory, the effects of essentialism on lesbians, including the meaning and construction of lesbian experience, and questioning whether it makes sense to develop a specific lesbian legal theory separate from feminist legal theory); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (suggesting that the pro-gay legal argument should focus not on immutability, but rather on the shared notions that adequately represent the self-conceptions of the essentialists and the constructivists); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993) (discussing the constructivist debate and its implications).

45. This point is the thrust of the racial critique of sexual orientation scholarship. *See* Hutchinson, *supra* note 8, at 585 ("Gay and lesbian theorists embrace essentialism by excluding issues of race from [the] analysis.").

46. *See generally* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993) (sketching these points in the context of Asian-American legal scholarship).

As articulated within critical race theory, these concepts have focused mainly on the social and legal position of black women in antisexist and antiracist projects.[47] Multiplicity highlights that black women embody both a minority race and a minority sex in a social and legal culture that devalues both of these minority identities. Intersectionality highlights how the interplay of these devalued minority features combine to displace the interests of black women in antiracist and antisexist venues: black women are marginalized due to race in antisexist projects dominated chiefly by white women and in antiracist projects dominated mainly by black men. The combination of white privilege and male privilege in each venue thus marginalizes the social position and legal interests of black women in both antiracist and antisexist social justice ventures. In this way, multiplicity and intersectionality stress how single-axis or unidimensional approaches to social justice based on race/ethnicity or sex/gender are intrinsically and unduly self-limiting as antisubordination projects.

As applied to their original setting, multiplicity and intersectionality have been strikingly successful interventions. They have managed not only to produce new knowledge and to spawn a new discourse,[48] but also to affect for the better judicial approaches to antidiscrimination doctrine regarding women of color more generally.[49] But apart from isolated efforts,[50] these powerful concepts have not been extended by widespread use to other key domains of life and law where multiplicity and intersectionality also have significant value.[51] One such domain is legal scholarship on sexual orientation, which, until this year, has awaited a programmatic adoption of intersectional and multidimensional analysis to overcome the limits of single-axis approaches to social injustice on behalf of multiply diverse sexual minorities.[52] This belatedness, already odd in light of demographic sexual minority diversities and parallel jurisprudential developments, is made more anomalous by the emergence of Queerness *within* sexual minority culture and discourse in the few years immediately following the 1979 symposium.

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47. *See supra* notes 37–40 and accompanying text.

48. *See, e.g.*, Symposium, *Women of Color at the Center: Selections from the Third Annual Conference on Women of Color and the Law*, 43 STAN. L. REV. 1175 (1991); *see also* Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993).

49. *See, e.g.*, Lam v. University of Haw., 40 F.3d 1551, 1561–62 (9th Cir. 1994) (adopting intersectional analysis and applying it to the sex-and-race discrimination claim of an Asian woman).

50. *See supra* notes 6–8 and sources cited therein.

51. Ironically, one of these gaps has been within critical race theory itself, which on the whole has been internally inattentive to multiplicities and intersectionalities that implicate minority sexual orientation. For an analysis of this omission and its impact on critical race theory in light of the same social circumstances addressed in this Afterword, see Francisco Valdes, *Theorizing "OutCrit" Theories: Comparative Antisubordination Experience and Postsubordination Vision as Jurisprudential Method*, *in* CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS, *supra* note 36.

52. For a more detailed discussion of intersectionality's relative utility in sexual orientation social analysis and legal analysis, see Valdes, *supra* note 26, at 1333–40.

### C. *Queering Sexual Orientation Legal Scholarship*

The move to intersectional and toward multidimensional analysis pioneered by critical race theorists—and now advanced and foreshadowed in sexual orientation scholarship by the 1997 symposia—is important because it expands the reach and insight of sexual orientation scholarship in the legal academy and beyond it. This move, and the expansive scope of critical inquiry that postmodern outsider methods make possible, are better suited to uncover insights that are likely to elude single-axis projects, which reduce sexual minority lives and interest to a single dimension—typically sexual orientation.[53] But the move toward multidimensionality is counseled by more than internal critique, demographic diversity and outsider jurisprudence. Multidimensionality is counseled as well by social changes within sexual minority culture, politics and discourse.

Within a few years of the 1979 symposium, a formation known as Queer identification was being constructed by sexual minority activists and theorists to emphasize multidimensional approaches to social relations from a resolutely nonheterosexual viewpoint.[54] Those theorists and activists constructed and proposed Queerness specifically as a formation that embraces antisubordination purpose *and* evinces multidimensional method.[55] While emanating from sexual minority opposition to compulsory heterosexuality, the Queer position was invented to counter from a consciously outgroup perspective the traditionalist assumptions and cultural practices of majoritarian self-interest across multiple categories of identity.

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53. Single axis approaches to social and legal issues may obscure various forms, levels or dimensions of relevant particularities. For instance, such analyses may overlook the distinction between "homo-sexual" and "homo-social" events, and related trans/cultural phenomena. In this symposium, Katherine Franke powerfully illustrates this point in her examination of "sex" and cultural notions of eroticism. Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139 (1998). Using ritualized semen practices in Papua, New Guinea and the brutal assault of Abner Louima by New York City police officers, Franke examines the effects of these concepts and their role in constructing and perpetuating power relations, and argues for the approach used by the International Criminal Tribunal for the Former Yugoslavia, which treats sex-related violence as the *actus reus* of other crimes, like torture or crimes against humanity, thereby avoiding the "essentialization of certain body parts and human behaviors as fundamentally sexual." *Id.* at 1143. In so doing, Franke resists single-axis conventions, extending her critique of these homo/sexualized events and phenomena to transnational realms of race, culture, ethnicity, and religion.

54. *See, e.g.*, Symposium, *More Gender Trouble: Feminism Meets Queer Theory*, 6 DIFFERENCES 1 (1994); Symposium, *Queer Subjects*, 25 SOCIALIST REV. 1 (1995); Symposium, *Queer Theory/Sociology: A Dialogue*, 12 SOC. THEORY 166 (1994).

55. *See generally* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY (Michael Warner ed., 1993) (presenting a collection of Queer theory, cultural studies and politics); Suzanna Danuta Walters, *From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?)*, 21 SIGNS 830 (1996) (articulating a self-critical discussion of Queerness and its postmodern politics). For a discussion of Queerness and legal theory, see Valdes, *supra* note 3, at 344–77.

As crafted by the activists and scholars from other disciplines that to this day are its primary exponents, Queerness signifies a politically progressive subject position in scholarly and public discourse: "Being queer . . . means everyday fighting oppression; homophobia, racism, misogyny, the bigotry of religious hypocrites and our own self-hatred."[56] This Queer credo avows a broadly-conceived antisubordination stance that explicitly resists homophobic as well as other bigoted structures or practices. The multidimensionality of Queerness thus poises Queer analysis to confront the full range of Euro-heteropatriarchal tenets and biases, both throughout American society and within sexual minority communities.[57] These tenets include Eurocentric biases, including preferences for attributes associated with white and Anglo cultures or identities, that predominate in the sexual majority as well as among sexual minorities. These tenets also include patriarchal biases that prefer males and masculinity over females and femininity, whether in sexual minority communities or beyond them. Finally, these tenets include heterosexism, which valorizes cross-sex over same-sex desire, intimacy and bonding—tenets that prevail in society but that also swirl throughout sexual minority communities in the form of internal(ized) self-hate. As a set, these biases encapsulate white, male and straight supremacies to structure Euro-heteropatriarchal hegemony in American culture and society.[58] Queer multidimensionality stands purposefully in opposition to the multidimensionality of Euro-heteropatriarchy.

Consequently, Queerness is a formation for the times: it counsels intra- and inter-group egalitarianism while demanding social justice solidarity and responsibility. Its ideals gainfully can be adapted for employment in sexual orientation legal discourse to promote constructive scholarly engagement of diversity and postmodernity. Queer cultural activism and interdisciplinary theorizing therefore can provide the point of departure for articulating and practicing Queer *legal* theory as a form of multidimensionalized antisubordination praxis in sexual orientation sociolegal contexts.

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56. Anonymous Queers, *Queers Read This*, *in* LESBIANS, GAY MEN, AND THE LAW 45–47 (William B. Rubenstein ed., 1993).

57. The range is wide, indeed. *See generally Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) (addressing an array of legal issues faced by gay men and lesbians); Brendan F. Crowe et al., *Current Developments in the Law: A Survey of Recent Cases Affecting The Rights of Gays, Lesbians and Bisexuals*, 3 B.U. PUB. INT. L.J. 379 (1993) (surveying recent cases involving issues facing gays, lesbians, and bisexuals); Standing Comm. on Lesbian and Gay Legal Issues, Soc. Responsibilities Special Interest Section, Am. Assoc. Law Libraries, *Sexual Orientation and the Law: A Selective Bibliography on Homosexuality and the Law, 1969–1993*, 86 L. LIBR. J. 1 (1994) (listing a bibliography of books, journals, symposia, films, legal organizations, and articles on the subject of homosexuality and the law).

58. *See supra* note 24.

If Queerness is practiced with fidelity,[59] the move to intersectional and multidimensional analysis in sexual orientation legal discourse may be tantamount to the move from single-axis "gay" and/or "lesbian" scholarship to a more expansive enterprise that may be denominated "Queer legal theory"; it is the move signaling scholarly recognition that a prospective abolition of sexual orientation discrimination would not terminate social injustice against sexual minorities based on race/ethnicity, class, dis/ability, sex/gender and other axes of social or legal status. It is the move from a reductionist or unidimensional anti*discrimination* scholarship to an intersexional and multidimensional anti*subordination* scholarship.[60] It is the scholarly move that this symposium, like its counterpart, heralds as the ideal and standard of the future in sexual orientation social justice scholarship.[61]

This move, however, cannot represent any relaxation of the focus on sexual orientation as a unique and urgent unit of antisubordination analysis, even as it becomes part of a multidimensional expansion in antisubordination scholarship and praxis. This precaution is underscored by another current event: the hate-murder of Matthew Shepard—a white, gay male college student—in Wyoming the year after these twin symposia were held. Matt's murder illustrates both the singularity and multidimensionality of homophobia and straight supremacy.[62]

Possessing both whiteness and maleness, Matt likely was sheltered from the ravages of white and male supremacy during his brief life. Unlike lesbians, female bisexuals, women and all sexual minorities of color,

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59. The articulation of Queerness remains controversial in part because it has been experienced as a white, male and bourgeois formation. *See generally* Valdes, *supra* note 3, at 356–60.

60. *See* Valdes, *supra* note 26, at 1311–13.

61. In this InterSEXionality Symposium, Martha Ertman takes this scholarly move to heart. *See* Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998). Examining her proposal for the implementation of premarital security agreements, Ertman addresses the multidimensional effects of that move: the potential results of undermining or entrenching compulsory heterosexuality; redefinitions of traditional gender roles and the effects on gender performativity doctrine; potential to reverse the current law's conflation of sex, gender, and sexual orientation; support for same-sex marriage; and responses to potential critiques regarding the maintenance of racial or class inequities. It is this measured, multidimensional approach that these recent symposia attempt to bring to the forefront of antisubordination scholarship, and is the approach I argue is a necessary component of effective antisubordination efforts now and, increasingly, in the future.

62. Consider the events surrounding his murder: Matt's alleged murderers are reported to have attacked two Latinos shortly after their fatal beating of Matt. The two Latinos fought back and repelled their assailants, who were arrested as a result of this incident. *See* Betsy Streisand et al., *A Death on the Prairie*, U.S. NEWS & WORLD REP., Oct. 26, 1998, at 22, 25. Persons who know the alleged assailants additionally reported to the media that Matt's alleged murderers were multidimensional bigots, known for expounding "stupid stuff about black people and gay people" as well as, apparently, attacking Latinas/os. Steve Lopez, *To Be Young and Gay in Wyoming*, TIME, Oct. 26, 1998, at 38, 39. The interplay of race, ethnicity, sex/gender and sexual orientation in the events and communities surrounding Matt's murder thus provide a contemporary case-in-point for multidimensional analysis of social and legal power relations. *See infra* note 69 and sources cited therein.

he likely reaped white *and* male privileges, as his physical and cultural features more likely than not buffered him from any extended or structural exposure to prevalent strains of racism and sexism: white supremacy and male supremacy. But those awesome identity privileges—arguably the most pervasive and entrenched of all social structures—were not enough to safeguard Matt's life, nor even his pursuit of happiness.[63] Despite the privileges of his race and sex, Matt was targeted for a horrific demise on the basis of his minority sexual orientation. Without doubt, our scholarship and activism must continue to labor for the protection of Matt and others like him among us, and to denounce those that try to deprive us—*any* of us—of life, liberty or happiness.

But our scholarship also must begin, finally, to show a similar and equal concern for others like Matt who do not share his privileges. And there are many such sisters and brothers among us: those who are nonwhite or nonAnglo or women or poor or disabled or noncitizens; those who are not Christian; those who are most noticeably gender-atypical; those who suffer from HIV and AIDS. Each of these identity categories represents many women and men who suffer the consequences of more social ills than simple homophobia,[64] and who therefore require more than the end of just homophobia to claim the benefits proffered in principle by this nation's formal commitments to liberty, equality and justice.[65]

Matt's brutal end thus reminds us that the privileges of race and sex cannot protect persons with a minority sexual orientation from social savagery. But the diverse demography of sexual minorities simultaneously warns us that the abolition of sexual orientation discrimination cannot protect all gays and lesbians from the ravages of sexism, racism, nativism, ethnocentrism, antiSemitism and other similar scourges of equality, justice, dignity and harmony.[66] This conjunction of death and

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63. For a now-classic exposition of both privileges, and the myriad settings in which they operate, see Peggy MacIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, *in* POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22 (Leslie Bender & Daan Braveman eds., 1995); see also Devon W. Carbado, Straight Out of the Closet (unpublished manuscript, on file with author) (developing a similar connection between straight and white privilege from a black male heterosexual perspective). *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (arguing that whiteness and the associated privileges act as a continuing form of property interest). For additional critical readings on whiteness and its sociolegal impact, see *infra* note 99 and sources cited therein.

64. For a sampling of testimonials, see Valdes, *supra* note 3, at 359 n.1266. For critical analyses, see *supra* note 6 and sources cited therein.

65. These formal commitments oftentimes are honored in the breach, but majoritarian betrayal of national principles does not lessen the claim of outgroups to their fulfillment, even if belated and incremental. *See* Valdes, *supra* note 3, at 123 n.330.

66. Patricia Cain alerts us to the dangers of excluding trans/bi-gendered people from "sexual orientation" analyses by examining the lives of a number of transsexuals and showing us the importance of those lives to "our" issues. Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321 (1998). In this way, Cain underscores the diversity of "sexual minority" communities that suffer under heteropatriarchy. *See supra* note 5 (addressing diversity and commonality within "sexual minority" populations).

demography leads to the conclusion that underlies this symposium: no feature of identity safely can be cabined for isolated, unidimensional, decontextualized analysis within a Queer scholarship dedicated to anti-subordination transformation.

To serve the communities of multiply diverse sexual minorities that collectively form our diasporic tribes, we must craft agendas that reflect both the uniqueness and intricacy of sexual orientation as a category of social identity in a heterocentric and homophobic society. But in those agendas we also must account for our multiple diversities, and for the power of other identity bigotries that rage simultaneously within sexual minorities and throughout society. To do so, as Matt's killing also illustrates, Queer and allied scholars must begin paying more attention to another social change that has transpired since the 1979 symposium: the onset, spread and impact of cultural war. To understand our role as cultural warriors, Queer and allied scholars must begin to situate social justice legal scholarship within the current context of cultural traditionalism and majoritarian lawmaking through backlash identity politics.

### D. *Cultural War, Cultural Traditionalism & Majoritarian Essentialism*

Though not subjected to hate and bigotry based on race or sex, Matt's life was robbed by the homophobia of our laws and lawmakers who, in his case, had refused several times to enact state and federal statutes designed to help protect Matt from his eventual fate.[67] Because the majoritarian governing elites of Matt's state and country declined to include sexual orientation in their hate crime statutes, they not only refused to protect the vulnerable among their people specifically from hateful murder and other bodily harms, they also indirectly signaled approval for the practice of sexual orientation bias in civil society.[68] Despite his majority privileges, Matt's majoritarian society thus failed him; his government, state and federal, in effect made Matt a more inviting target for both structural and individual majoritarian malevolence. It is no wonder that the media characterized Matt as a casualty of cultural war:[69] Matt's

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67. According to media reports, the Wyoming legislature rejected sexual orientation hate crime legislation at least three times. *See* Margaret Carlson, *Laws of the Last Resort*, TIME, Oct. 26, 1998, at 40, 40. No such federal legislation exists either. For instance, the Hate Crimes Prevention Act of 1997 was rejected just this year. *See* Hate Crimes Prevention Act of 1997, H.R. 3081, 105th Cong. Though hate crime statutes, like other criminal laws, cannot guarantee safety, they are important to the social structure and progress of a just society because they promote and protect norms of equality, dignity, and harmony.

68. These and similar acts of retrenchment help to re-legitimize bigotry, and to foster inequality. *See generally* Crenshaw, *supra* note 20 and accompanying text; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (discussing the regressive effects of rulings that effectively validate racial discrimination); Yvonne L. Tharpes, Comment, Bowers v. Hardwick *and the Legitimization of Homophobia in America*, 30 HOW. L.J. 829, 830, 840–41 (1987) (noting that homophobic rulings validate social bigotry).

murder encapsulates the relationship between majoritarianism, lawmaking and sexual orientation scholarship in the midst of cultural war.[70]

The legislative failures preceding Matt's murder, like the killing itself, are far from isolated historical moments; they are encounters with ongoing repercussions in a cultural war being waged through majoritarian essentialism,[71] social terror, and formal legal process. This cultural war is unlike simple public controversy about the relative wisdom of one or another policy matter; it is a "war . . . for the soul of America," according to one leading ingroup warrior.[72] From that standpoint, waging cultural war has spawned a determined and conscious use of visceral hate and physical violence to emote and aggravate social division between ingroups and outgroups through the persistent and hyperbolic sloganeering of "wedge" issues;[73] these wedge issues, as the various lawmaking campaigns of this war have shown, tend to pivot for the most part on sociolegal identities and interests derived from sexual orientation, race/ethnicity/nationality, socioeconomic class and sex/gender.[74] This sharp-edged cultural war has bred a stridency toward lawmaking that professedly is justified by the "moral" imperatives of cultural tradi-

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69. The grisly murder sparked international attention. According to media reports, the victim was befriended in a straight neighborhood bar by two young men accompanied by their two girlfriends. They then beat him into unconsciousness, took him to a "rocky ridge just outside of town" and beat him again while he begged for his life. Lopez, *supra* note 62, at 39. They next strung him up to a nearby fence pole and left him hanging there in subzero weather. Matt was discovered about 18 hours later, and died several days later without regaining consciousness. *See* Richard Lacayo, *The New Gay Struggle*, TIME, Oct. 26, 1998, at 32, 33; Streisand et al., *supra* note 62, at 22, 24–25; *The Hate Debate*, NEW REPUBLIC, Nov. 2, 1998, at 7, 7–8; *see also* Andrew Gumbel, *Gay Man Beaten and Left for Dead in US*, INDEPENDENT (London) (Nov. 12, 1998), at 12.

70. The term "cultural war" refers to majoritarian reassertion of "democratic" lawmaking prerogative to reinvigorate cultural traditionalism throughout society, thereby containing or rolling back the practice of pluralism in American law and society. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991) (examining the historical significance and political implications of the cultural war in contemporary America). A declaration of cultural war was vituperated from the podium of the 1992 Republican National Convention by presidential contender Patrick J. Buchanan. *See* Paul Galloway, *Divided We Stand: Today's "Cultural War" Goes Deeper Than Political Slogans*, CHI. TRIB., Oct. 28, 1992, at C1; *see also* Black, *infra* note 72, at A12. The implications of this cultural war have been recognized by legal scholars for some time. *See, e.g.*, Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677 (1991); *see also* Aoki, *infra* note 83.

71. The discussion of majoritarian essentialism in cultural war is taken up further below. *See infra* Part E.

72. *See* Chris Black, *Buchanan Beckons Conservatives to Come "Home,"* BOSTON GLOBE, Aug. 18, 1992, at A12.

73. Wedge issues have become a standard feature of majoritarian electoral contests during the past decade or so. *See generally* Elaine Ciulla Karmack, *Nailing Down a Trap-Proof Platform*, L.A. TIMES, July 9, 1992, at B7 (describing the use of "family values" to foment wedge issues in the 1992 presidential election); *"Gay Rights," Public Prayer Are Two of the Most Divisive Social Issues*, SUN-SENTINEL, Oct. 14, 1996, at 12A (discussing sexual orientation equality as a wedge issue in the 1996 presidential election).

74. *See infra* notes 109–10, 124–26 and accompanying text.

tionalism,[75] but that has been executed with the plain aim of securing cultural supremacy as a matter of law and regardless of the human toll on outgroup communities.[76] This cultural war, unlike the usual policy controversy, consequently has encompassed meanspirited microagressions[77] and hate crimes, as well as backlash lawmaking, to stigmatize and beat back into submission—both literally and figuratively—outgroup persons and communities.[78]

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75. The moralism of majoritarian cultural war is determined largely by the fact that key majoritarian warriors identify as Christian fundamentalists with an evangelical passion for social policy; in effect, the mission of these warriors is to infuse public policy and social life with their preferred religious dogma through backlash lawmaking and cultural warfare. *See, e.g.*, Jeffrey H. Birnbaum, *Washington's Power 25: Which Pressure Groups Are Best at Manipulating the Laws We Live By? A Groundbreaking Fortune Survey Reveals Who Belongs to Lobbying's Elite and Why They Wield So Much Clout*, FORTUNE, Dec. 8, 1997, at 144, 144. *See generally* SARA DIAMOND, SPIRITUAL WARFARE: THE POLITICS OF THE CHRISTIAN RIGHT (1989) (providing a comprehensive account of the domestic and international political agenda espoused by Christian cultural warriors). Though beyond the scope of this Afterword, a corrollary to the analysis presented here is that cultural war also is about secularism versus sectarianism in this society. *See generally* Editorial, *Church, Politics, Abortion*, MIAMI HERALD, Nov. 21, 1998, at 24A (objecting to the "use of public office to translate church doctrine into general law").

76. For example, it is no coincidence, in this state of cultural war, that teenage suicide rates are highest among sexual minority teens; adolescence being the phase of maturation in which most humans, regardless of sexual orientation, identify themselves sexually, sexual minority teenagers tend to still lack the mechanisms for coping healthily with the omnipresent antipathy of institutionalized homophobia. *See, e.g.*, Lena H. Sun, *Gay Students Get Little Help with Harassment; Changing Attitudes, Court Decisions Prod Schools to Confront the Problem*, WASH. POST, July 20, 1998, at A1 (describing incidents of violence directed against sexual minority teenagers); *see also* Teemu Ruskula, *Minor Disregard: The Legal Constuction of the Fantasy that Gay Youth Do Not Exist*, 8 YALE J.L. FEMINISM 269, 270–73 (1996). Various studies over the years have concluded that sexual minority teens attemp suicide at higher rates than sexual majority teens, although these studies have been disputed because "there is no general agreement on . . . what constitutes a suicide attempt." Delia M. Rios, *Researchers Dispute Study on Gay Teen Suicide*, NEW ORLEANS TIMES-PICAYUNE, May 17, 1998, at A10. Nonetheless, no one disputes that young members of sexual minorities feel the impact of societal discrimination, including homophobia, even though their relative youth may not have prepared them to deal with it effectively. In addition, of course, the human toll of cultural war extends to harm inflicted on adults, harm that ranges from the physical and psychological to the social, legal and economic. *See, e.g.*, *infra* notes 78–82 and accompanying text. *See generally* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (1988) (examining the changing constructions of American conceptions of sexuality over the past 350 years and the resulting effects on individuals and society); HOMOPHOBIA: HOW WE ALL PAY THE PRICE (Warren J. Blumenfeld ed., 1992) (presenting a number of articles addressing the effects of homophobia on individuals, the homosexual community and society as a whole); JONATHAN KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 11–128 (1976) (documenting numerous instances and manifestations of harms against sexual minorities).

77. The term "microaggression" refers to everyday social slights that represent and replicate larger structures of subordination. *See* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1560, 1565–68 (1989).

78. The connection between the ongoing cultural war against sexual minorities and Matt's demise was a notable feature of media reports. "Gay politics is more complicated now because what seems like an irresistible force of cultural change is meeting an immovable object of political resistance. For a long time, lesbians and gays have been defining themselves into the ordinary fabric of life. All the while, conservatives have been field-testing homosexuality as a defining issue for the Republican Party, especially for the next presidential election." Lacayo, *supra* note 69, at 34. Simi-

The hate crimes, microaggressions and other acts of violation, harassment, and stigma committed annually against sexual and other minorities during this cultural war menace daily the physical safety and social wellbeing of outgroups[79]—a feature of the social landscape that in turn helps to set the stage for supremacist identity politics in the more sanitized venues of formal lawmaking processes. Packaged in democracy and morality,[80] one undemocratic and morally questionable objective of this cultural war is to paralyze the personal realization and social manifestation of sexual minority identity, rendering sexual minorities socially dysfunctional and invisible both as persons and as groups.[81] In this cultural war, everything adds up to uncivil animus enacted, and embedded in the nation's sociolegal fabric, through the majoritarian prerogatives of formal democracy.[82]

This warfare has become increasingly institutionalized in government, politics and law since the formal triumph of essentialized backlash politics in the results of the 1980 presidential election.[83] Although politi-

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larly grisly hate murders of sexual minorities have been committed during this cultural war. *See, e.g.*, Valdes, *supra* note 3, at 254–56 & n.915.

79. *See generally* VALERIE JENNESS & KENDAL BROAD, HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE 49–108 (1997) (discussing violence against sexual minorities and the enactment of anti-violence measures). Not surprinsingly, then, Matt's murder triggered a cascade of articles, editorials and columns on hate crimes and the pressing need for statutes designed to punish and stem them. *See, e.g.*, Bettina Boxall, *Long Arm of Hatred: Deadly Assault on Wyoming College Student Stunned People Across the Country, Reminding Many Southland Gays and Lesbians of Their Vulnerability to Attacks*, L.A. TIMES, Nov. 6, 1998, at B2; Jean Buchanan & Diane Carroll, *Recent Crimes Serve as Painful Reminder Homosexuals Face Fear of Physical Attacks on Daily Basis, Some Say*, KAN. CITY STAR, Oct. 14, 1998, at A1; Editorial, *A Tool Against Terrorism: Georgia Needs Laws to Fight Hate Crimes*, ATLANTA CONST., Oct. 19, 1998, at A6; Gregory Freeman, *Hate Crime Laws Are Necessary to Send Clear Message*, ST. LOUIS POST-DISPATCH, Nov. 3, 1998, at B1; Jose Martinez, *Climate of Fear Haunts Gays; Wyo. Murder Puts Anti-Bashing Laws on National Stage*, BOSTON HERALD, Oct. 18, 1998. This climate of cultural intimidation through physical and social violence of course prevailed before Matt's murder, and the media reported it periodically. *See, e.g.*, Robert L. Kaiser, *Gay Haven on Halsted Not Immune to Violence: Homosexuals Fleeing From Prejudice Find They are Targets*, CHI. TRIB., Sept. 28, 1998, at 1.

80. *See generally* Chai R. Feldblum, *Sexuyal Orientation, Morality and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996) (articulating two conceptions of equality to argue for legislation aimed at ensuring the equality of sexual orientation minorities).

81. *See* Francisco Valdes, *Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the End of the Twentieth Century*, 1 IOWA J. GENDER, RACE & JUSTICE 213 (1997); *see also* David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 325–30 (1994); Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 946–63 (1989); Douglas Warner, *Homophobia, "Manifest Homosexuals" and Political Activity: A New Approach to Gay Rights and the "Issue" of Homosexuality*, 11 GOLDEN GATE L. REV. 635 (1981).

82. *See generally* JAMES HUNTER: BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR (1994).

83. That election is viewed as the triumph of the straight, white, affluent man because that is the identity category that was favored in policy and lawmaking. For readings on the identity ideology and rhetoric of Ronald Reagan's election, see THE ELECTION OF 1980: REPORTS AND INTERPRETATIONS (Marlene Michels Pomper ed., 1981). For a discussion of critical legal scholar-

cians ranging from George Wallace to Richard Nixon had catered since the 1970s to the incipient sense of majoritarian backlash that eventually culminated in today's cultural war, the 1980 election was a watershed in the flow of identity politics in contemporary lawmaking: that election swept into power a president backed by savvy zealots dedicated to the "social agenda" of cultural traditionalism, which frankly favored traditionally dominant identity groups and heavily targeted sexual minorities, racial/ethnic minorities and women for social justice takebacks.[84] Rather than mark an ephemeral interlude in the gradual social progression of an enlightened and pluralistic society, 1980 marked the intensification of a brewing demand for retrenchment, which since then has been waged against the nation's "minorities" under the banner of "traditional values" and through a righteous but self-interested deployment of majoritarian power, rhetoric and ambition.

The continuation of that war, and its politics of self-interested cultural majoritarianism, were confirmed in the second pivotal triumph of backlash since the 1979 symposium: the 1994 election of a Congress to enact the agenda of social traditionalism embodied by the so-called "Contract with America" that served expressly as the platform of victory that year.[85] By 1994, the triumphant identity category was unabashedly calling itself the "angry white man"—just the sort of human to be seduced by slogans appealing to majoritarian essentialism to push the backlash agenda.[86] Since 1980, the essentialized identity politics of majoritarian cultural war have been introduced into all branches and levels of government, as well as into all processes of lawmaking, bearing both judicial and legislative social justice retrenchment in the name of traditional values.[87]

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ship and the backlash politics advanced and unleashed since then, see Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996).

84. *See, e.g.*, ELIZABETH DREW, PORTRAIT OF AN ELECTION: THE 1980 PRESIDENTIAL CAMPAIGN 188–92, 342–43 (1981).

85. *See Inside Politics: Contract with America is Top Political Play of the Year* (CNN television broadcast, Dec. 23, 1994) (transcript #727-4), *available in* LEXIS, News Library, CNN file. This "contract" has been published as a book. CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (Ed Gillespie & Bob Schellhas eds., 1994). For analysis of the 1994 elections, see MIDTERM: THE ELECTIONS OF 1994 IN CONTEXT (Philip A. Klinkner ed., 1996) [hereinafter MIDTERM]; *see also* Evan Thomas & Rich Thomas, *A Guide to the First 100 Days*, Newsweek, Jan. 9, 1995, at 20 (examining the events immediately following the midterm elections).

86. *See, e.g.*, Grant Reeher & Joseph Cammarano, *In Search of the Angry White Male: Gender, Race, and Issues in the 1994 Elections*, *in* MIDTERM, *supra* note 85, at 125.

87. A contemporary legislative example especially germane to sexual minorities in the legal profession is congressional passage of the "Solomon-Pombo" amendment, also known as the "Solomon II" amendment, which denies certain federal funds to universities and law schools that prohibit military recruiters from using on-campus facilities. *See* 10 U.S.C.A. § 983 (1998); 32 C.F.R. § 216.4 (1997). This amendment was motivated by the specific intent to coerce retrenchment in law school antidiscrimination policies aimed at reducing sexual orientation bias: because the military formally discriminates on the basis of sexual orientation, those antidiscrimination law school poli-

This retrenchment is vitally important to Queer and allied *legal* scholars because it has been secured in large measure through the focused, methodical and determined reassertion of control over electoral contests, legal institutions and policy processes to impose cultural traditionalism by law throughout American society.[88] The social agenda of "traditional values" that essentialized and propelled majoritarian backlash both in the 1980 presidential election and in the 1994 congressional elections installed lawmakers on the basis *both* of majoritarian identity politics *and* formal commitment to the imposition of cultural traditionalism by law.[89] Though that agenda has only fitfully and partially been realized, judicial nominations and rulings began increasingly to reflect the demands of cultural traditionalism soon after the 1980 triumph of majoritarian backlash in much the same way that congressional representation and lawmaking became increasingly oriented to the same social agenda of "traditional values" after the second triumph in 1994[90]—as the 1996 flurry of backlash legislation well illustrates.[91] The invidious result of this ongoing cultural war is the institutionalization of a lawmaking environment pervasively and actively hostile to outgroup or "minority" interests.[92]

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cies had the effect of barring the military from on-campus recruiting of law students. For a detailed analysis, see Section on Gay and Lesbian Legal Issues, Amelioration Report and Recommendations, (Sept. 15, 1998); Section on Gay and Lesbian Legal Issues, Supplemental Report, On-Campus Military Recruiting—Balancing AALS Rules, Other Nondiscrimination Policies and the Solomon II Amendment, (Dec. 15, 1998). Early drafts of these reports are published in Francisco Valdes, *Solomon's Shames: Law as Might and Inequality*, 23 THURGOOD MARSHALL L. REV. (forthcoming 1999); *see also* Francisco Valdes, Justice Under Solomon: Sexual Orientation, the Spending Power and the Takings Clause (unpublished manuscript, on file with author). For accounts of similarly regressive judicial action, see *infra* note 130 and sources cited therein on doctrinal retrenchment.

88. *See generally* JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996) (addressing the role of think tanks and foundations in initiating conservative retrenchment in 1968 and propelling it to a national prominence in the mid-1980s).

89. *See generally supra* notes 83–86 and sources cited therein.

90. *See generally* LINDA KILLIAN, THE FRESHMEN: WHAT HAPPENED TO THE REPUBLICAN REVOLUTION? (1998) (reporting on the Republican freshman class of the 104th Congress).

91. For instance, the Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996) and 28 U.S.C.A. § 1738C (West Supp. 1998)), was passed to undermine preemptively the legitimacy of same-sex marriages that might be recognized under one or more state constitutions. *See infra* note 121 and accompanying text. Also notable among that year's legislation are the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2015 (codified as amended in scattered sections of 42 U.S.C.) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 28 U.S.C.). These two enactments constrict public benefits available for communities of color at high risk of social ills—ills which in turn originate with, and continue to be exarcebated by, the existence and preferences of white supremacy in this country and its laws. *See generally* TOMAS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994) (setting forth the historical development of white supremacy in California). For additional critical readings in white privilege and power, see *supra* note 63; *infra* note 99.

92. *See infra* notes 102–36 and accompanying text (discussing three lines of backlash lawmaking—direct referenda, spending restraints, and the restaffing of the judiciary).

This political, legal and social drive for cultural traditionalism continues today, even after the 1998 midterm elections that were viewed by many as a public rejection of backlash zealotry.[93] As the most recent post-election calls of majoritarian warriors—urging intensification rather than rethinking of their supremacist efforts—indicate, no single election is likely to undo the cumulative impact of nearly two decades characterized by cultural war and majoritarian belligerence.[94] Though the fact of war signifies that the ultimate outcome of conflict remains unrealized, the 1998 elections do not overturn any of the sociolegal regimes already enacted and imposed via cultural war and backlash lawmaking.[95] Nor do they alter the zeitgeist of warfare. Until such time, antisubordination legal scholars must become, and remain, cultural warriors.

Thus, to be socially and legally relevant in these particular times, Queer and allied legal scholars must begin to appreciate how cultural war is not only a terror-backed contest for the "soul" of the nation, but more specifically a campaign being managed through the excitation and manipulation of majoritarian essentialism. By majoritarian essentialism I mean the evocation and exploitation of ingroup identifications based on race/ethnicity, socioeconomic class, sex/gender, religion, sexual orientation and other identity features to consolidate and galvanize structurally-dominant groups around an essentialized sense of self-interested backlash based on majority identities. The "majoritarian" character of this essentialism therefore does not refer exclusively or primarily to simple numerical advantage, but to the leveraging of accumulated social and economic power positions that empower and poise some social groups effectively to control the structures and levers of "democratic" lawmaking. And the "essentialist" character of this majoritarianism refers to the practice of occluding ingroup diversities to create through the slogans and jingles of "traditional values" a falsely homogenized sense of ingroup superiority, security and privilege, which in turn exaggerates ingroup feelings of common self-interest. Today's form of majoritarian essentialism, most recently captured in the image, agenda and celebrity of the "angry white male,"[96] essentializes and activates majority identifi-

93. *See supra* note 19 and sources cited therein.

94. Indeed, cultural war has brought into the open a vicious and mean spirited form of traditional majoritarian values. In the name of traditional sexual majority values, some Americans cheered the vicious murder of openly gay college student Matthew Shepard in Wyoming on October 12, 1998. *See supra* notes 62–70 and accompanying text (discussing the circumstances surrounding Matt's murder). One media report, for instance, describes "a Kansas minister with a website called *godhatesfags.com* ma[king] plans to do a grave dance at [Matt Shepard's] funeral." Lopez, *supra* note 62, at 38.

95. The forces of backlash continue to press retrenchment relentlessly even today. *See, e.g.*, Anne Gearan, *GOP Presidential Hopefuls Put to Test*, MIAMI HERALD, Feb. 5, 1999, at 8A (reporting a "litmus test" questionnaire that asks presidential aspirants questions such as, "Would you place a creche on the White House lawn if ordered to refrain from doing so by the Supreme Court?").

96. *See supra* notes 85–86 and sources cited therein.

cations to portray a solidarity of intra-majority sociolegal interests, even though all ingroups, like all outgroups, are multiply diverse across multiple axes of identity and interest.

For instance, even though news reports indicate that Matt's alleged murderers were not especially privileged in terms of, say, class,[97] the continual agitation of majoritarian essentialism and the surrounding cries of cultural warfare apparently emboldened them to kill brazenly in the name of ingroup privileges accruing from straight supremacy.[98] Even though Matt's alleged murderers may in fact have little net cause to celebrate personally the socioeconomic status quo, they apparently could claim, and wield with at least momentary impunity, the heady power of another privilege: straight supremacy based on sexual orientation. And, in fact, they did. Despite their seeming lack of elite status or overall social and economic prospects, those two men allegedly asserted through torture and murder an essentialized identity based on majority sexual orientation, flexing a privileged status structurally and normatively proffered to them under this society's identity hierarchies.[99]

The essentialization of sexual orientation and other identity axes to entice and intoxicate majority-identified persons and groups with the sensation of privilege thus equips majoritarian elites to catalyze their warriors, and to rationalize the perpetual oppression and abuse—and even the occasional murder—of their "othered" neighbors under the banner of cultural traditionalism. Through the rhetoric and mentality of cultural war, majoritarian warriors inflame essentialism among multiply diverse ingroups, inciting oppressive and socially divisive assertions of majority-identity privileges, even when the "average" ingroup person in fact does not (or may not) enjoy the privileges concentrated specifically in ingroup elites. Majoritarian essentialism, as our times attest, thereby enables the crude but potent "us" versus "them" wedge issues and strate-

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97. Though not detailed, news reports described one of the alleged murderers as "total redneck" and a "punk, like any other punk you see on the street" (characterizations offered by an acquaintance), and both also were described as "high school dropouts." Lopez, *supra* note 62, at 39. In addition, one was reported to be "awaiting sentencing for burglarizing a Kentucky Fried Chicken." *Id.* Though inconclusive, these images collectively hint at less than elite class status.

98. News reports of the murder suggest that Matt's beating, and then his being left "hanging on the fence on the rocky ridge just outside of town," evinced minimal concern for keeping the crime secret. Lopez, *supra* note 62, at 39. *See generally supra* notes 62, 69 (outlining the events surrounding and media coverage of Matt's murder). For this reason, *Time* described the crime as not only "unspeakably gruesome" but also "profoundly dumb." Lopez, *supra* note 62, at 39.

99. Of course, the attack on two Latinos following Matt's fatal beating was the exercise of another form of identity superiority—white privilege—based on race and ethnicity. *See supra* note 63 (citing sources addressing both white and male privilege). *See generally* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997) (providing collection of articles addressing "whiteness" and its implications and manifestations in history, the law, privilege, and cultural roles); STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCES UNDERMINE AMERICA (1996) (examining the existence and perpetuation of white privilege in the workplace, residential housing patterns, the media, law, and educational structures).

gies that backlash identity politicians have used throughout this cultural war to conscript essentialized consciousness among majority-identified ingroups for backlash lawmaking against "minority" outgroups. By "majoritarian essentialism" I thus mean the practice of elites *within* traditionally dominant ingroups to energize ingroup-identified persons around a social agenda of self-interested lawmaking based on the illusion of uniformity among "majority" identities and interests. The cultural war being waged today with majoritarian essentialism and through backlash lawmaking therefore is highly relevant to postmodern social justice legal scholarship.

Because the developments sketched[100] here have profound connections to law and lawmaking, the implications of these developments are directly relevant to *legal* scholarship—and especially so for legal scholarship devoted to social justice transformation. While fostering a harsh public climate conducive both to random and structural social intimidation, this cultural war, as outlined in more detail below, also is a systematic orchestration of majoritarian power—numerical, structural and economic—being marshaled and deployed specifically to arrest the civil rights progress of this century through a series of contemporary lawmaking campaigns concentrated methodically along three lines of simultaneous attack. To reassert majoritarian primacy, if not cultural supremacy, essentialized ingroup self interest has generated a form of backlash "democracy" along three lines of lawmaking attacks that interact to cut off fragile sociolegal life lines to some of the most vulnerable individuals and communities of the nation.

### E. *Formal Democracy, Cultural War & Backlash Lawmaking*

In this ongoing war, (at least) three lines of backlash lawmaking seem to have emerged as majoritarian favorites, and sexual minorities appear as prominent (though not exclusive) targets in each line of attack. The first line is the organization of "direct" referenda that commandeer governmental regulation of sociolegal issues simply by counting ballots. The second is the surgically targeted exercise of federal (and state) spending powers to disembowel programs that might aid outgroup survival and empowerment. The third is the doctrinaire restaffing of the federal (and state) judiciaries with majoritarian ideologues, warriors and sympathizers. These three lines of attack, slowly but steadily put into place since 1980, have established the dominance of essentialized back-

100. The account unfolded in this Afterword does not attempt a comprehensive analysis of cultural war and electoral politics that effectuate backlash lawmaking. This account oversimplifies a much larger and complex phenomenon to distill its basic relevance to this symposium and the discourse it advocates.

lash as "democratic" lawmaking to wear down, if not destroy, sexual minority and other outgroup social justice quests.[101]

The first line of attack—classically majoritarian devices like "popular" referenda—has been employed since the 1979 symposium to legislate directly and definitively the impossibility or impracticability of social justice reform on sexual orientation.[102] These campaigns—in Oregon,[103] Colorado,[104] Hawaii,[105] Alaska,[106] Florida,[107] California[108] and elsewhere—have been designed to remove sexual orientation entirely from the universe of human or civil rights, much less social justice and transformation, by codifying a self-serving version of "traditional values" as formal law and cultural norm. While majoritarian cultural warriors eagerly pursue direct takebacks in race/ethnicity[109] and sex/gender[110] fronts

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101. *See infra* notes 102–36 and accompanying text (outlining the three lines of backlash lawmaking attacks on non-majoritarian positions).

102. *See, e.g.*, Symposium, *The Constitutionality of Anti-Gay Ballot Initiatives*, 55 OHIO ST. L.J. 491, 491–93 (1994); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 154–55 (1993); Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1905–06 (1993).

103. Illustrating that the outcome of cultural war is not a foregone conclusion, voters in Oregon rejected the base appeals of majoritarian warriors for their endorsement of homophobia by law in that state. *See, e.g.*, Lisa Keen, *Referendums and Rights; Across the Country, Battles Over Protection for Gays and Lesbians*, WASH. POST, Oct. 31, 1993, at C3. *See generally* Hans A. Linde, *When Inititative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) (providing a constitutional analysis by the Senior Judge of the Oregon Supreme Court of the mis/use of majoritarian politics to formalize sexual orientation discrimination).

104. In Colorado, this use of state referenda to stymie sexual minority equality claims or gains was successful, but eventually produced the Supreme Court's contrary ruling in *Romer v. Evans*. 517 U.S. 620 (1996) (striking down on equal protection grounds Colorado's Amendment Two, which had amended via referendum the state constitution to prohibit any state entity from enacting any sexual orientation antidiscrimination policies); *see also* Colloquium, Romer v. Evans*: The Decision and its Impact*, 2 NAT'L J. SEXUAL ORIENTATION L. 1 (1996) (visited Dec. 23, 1998) <http://sunsite.unc.edu/gaylaw> (this journal is the nation's first on-line law journal); Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1057, 1063–80 (1994) (recounting the legal activity following passage of Amendment 2). *See generally* David W. Dunlap, *Ruling Signals More Fights to Come*, N.Y. TIMES, May 21, 1996, at A21 (exploring the implications of the *Romer v. Evans* decision).

105. An anti-gay referendum was passed in Hawaii during the 1998 midterm elections, a reaction to judicial recognition of same-sex marriage rights. *See infra* notes 115 and 116 and accompanying text.

106. An anti-gay referendum also succeeded in Alaska in the 1998 midterm elections, and again in response to a nonmajoritarian judicial ruling. *See infra* note 117 and accompanying text.

107. In Florida, a measure was placed on the ballot, but then was struck from it by the state supreme court prior to the voting because the measure as drafted violated state law requirements for the presentation of policy questions to a mass vote. *In re* Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1019–21 (Fla. 1994).

108. In California, this kind of majoritarian contest has been concentrated chiefly on the expression and reinstituionalization of racism, nativism, classism and sexism, rather than homophobia. *See, e.g., infra* notes 109 and 110 and sources cited therein (discussing the recent passage of ingroup propositions in California).

109. The anti-immigrant and anti-affirmative action initiatives of California exemplify these efforts, highlighting how public officials can be instrumental in whipping up majoritarian essentialism and fervor. For examinations of the California initiatives, see Ruben J. Garcia, *Critical Race*

as well, the use of backlash referenda in today's cultural war suggests a strategic choice of sexual orientation to draw a line against even bare, formal equality in the cultural sands of the land.[111] Cultural war has fo-

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*Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 UCLA CHICANO-LATINO L. REV. 118 (1995); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995); Jeffrey R. Marguiles, *Closing the Doors to the Land of Opportunity: The Constitutional Controversy Surrounding Proposition 187*, 26 U. MIAMI INTER-AM. L. REV. 363 (1995); Eva Jefferson Paterson & Erica J. Teasly, *California's Campaign for Equal Opportunity: A Response to Governor Wilson's Open Letter*, 15 ST. LOUIS U. PUB. L. REV. 85 (1995); Note, *The Constitutionality of Proposition 209 As Applied*, 111 HARV. L. REV. 2081 (1998). Illustrating the interplay of democratic and judicial politics in the advancement of cultural war, these majoritarian enactments in turn can be validated by ingroup judges when challenged by outgroups after their passage. *See* Coalition for Economic Equity v. Wilson, 122 F.3d 692, 699 (9th Cir. 1997) (upholding Proposition 209's civil rights takebacks specifically on majoritarian grounds), *cert. denied*, 118 S. Ct. 397 (1997); *see also* League of United Latin-American Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997) (upholding in part, and striking down in part, various provisions of Proposition 187). For discussion of judicial retrenchment and its convergence with backlash referenda in the context of cultural war, see *infra* notes 127–36 and accompanying text.

110. Though backlash initiatives tend not to be framed vocally around gender, anti-immigrant and anti-affirmative action initiatives of course take back incentives to social justice based on gender as well as on race. *See, e.g.*, Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509, 1572–73 (1995). The social atmosphere of physical violence and microaggression associated with these referenda certainly extends to spheres in which gender is most salient. For instance, on October 23, 1998—sixteen days after Matt's fatal beating—the "seventh casualty of anti-abortion violence since 1993" was shot to death by a sniper. T. Trent Gegax & Lynette Clemetson, *The Abortion Wars Come Home*, TIME, Nov. 9, 1998, at 34, 34. At roughly the same time, "five [abortion] clinics in three states received powder-laced letters saying the recipients had just been exposed to anthrax," a deadly chemical agent. *Id.* Understandably, public discourse on sex/gender issues for some time has reflected concern over the fallout of cultural war and backlash identity politics. *See, e.g.*, SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991); Nancy Gibbs, *The War Against Feminism*, TIME, Mar. 9, 1992, at 50, 50–55. Consequently, social power and inequality are integral to sex/gender antisubordination legal discourse. For examples of the use of the concepts within antisubordination discourse, see AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY (Martha Fineman & Nancy S. Thomadsen eds., 1991); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW (1992); Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label "Lesbian"?*, 8 HASTINGS WOMEN'S L.J. 1 (1997); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Elizabeth M. Iglesias, *Rape, Race and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869 (1996); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991). Finally, the economic impact of democratic initiatives that do pass into formal law typically are likely to fall disproportionately on the poor within these identity outgroups, whether defined principally by racialized, ethnicicized and/or gendered relations. *See generally* Symposium, *The War on Poverty: New Perspectives*, 1 D.C. L. REV. 1 (1992) (addressing the successes and failures of legal protections of the poor); Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41; *infra* note 125 and sources cited therein (discussing the Legal Services Corporation).

111. Current federal law provides no general antidiscrimination protection on the basis of sexual orientation. *See supra* note 14 and authorities cited therein. For a review of rulings that deny antidiscrimination protection under federal law to sexual minorities, see Valdes, *supra* note 3, at

cused on sexual orientation as the issue through which the concept of de jure discrimination has been salvaged and revitalized.[112]

This stance is ominous, as it reintroduces into public affairs a notion repudiated by basic principles of equality: that human dignity, legal protection or social opportunity may be denied blanketly to individuals on the basis of mere membership in a disfavored identity group. Even the dominant wing of the current Supreme Court seemingly stipulates to the proposition that the Constitution's "simple command(s)" will not tolerate "individuals" being treated as "simply components of a racial, religious, sexual, or national class"[113]—yet this sort of invidious prejudgment based on sexual orientation identity is exactly what de jure inequality through cultural war and backlash lawmaking aims and achieves.[114] The revival of this invidious, supremacist notion is trained formally on sexual minorities today, but opens the possibility of similar formal stances against other outgroups in years and battles to come. This practice represents, implicitly at least, a substantive regression in the conception and trajectory of civil rights more generally.

Significantly, these supremacist sexual majority referenda continue with full force today: cultural war in Hawaii over a state supreme court vindication of same-sex marriage rights resulted in a proposed constitutional amendment being placed on the ballot for the 1998 midterm elections.[115] Passed by majority vote, the newly-amended state constitution now empowers the Hawaii legislature to amend the constitution and overturn the state supreme court.[116] A similar campaign also succeeded this year in Alaska; by a two-to-one margin, Alaskans voted to add to the state constitution a ban on same-sex marriage, an expression of majori-

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136–75. *See generally supra* note 28 (citing sources addressing sex and gender, and the relationship to sexual orientation). Of course, local and state laws and other antidiscrimination policies provide a patchwork of schemes that alleviate sexual orientation discrimination in specific locales or settings. *See* Valdes, *supra* note 26, at 1335.

112. *See* Frank Rich, *Protect All Families*, MIAMI HERALD, Jan. 14, 1999, at 25A (noting "the right's obsession with homosexuality" and linking it to a "take-no-prisoners culture war").

113. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J. dissenting, joined by Rehnquist, C.J., Scalia, J., and Kennedy, J.)

114. *See generally supra* note 57 and sources cited therein.

115. *See* Baehr v. Lewin, 852 P.2d 44, 67–68 (Haw. 1993). For a critical account of this ruling, see Danielle Kie Hart, *Same-Sex Marriage Revisited—Taking a Critical Look at* Baehr v. Lewin, 9 GEO. MASON CIV. RITS. L.J. (forthcoming 1999). The issues engaged in this litigation have been controversial within sexual minority circles. For an account by the leading sexual minority lawyer in that litigation, see Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1995). For analyses of the potential repercussions of that litigation, see Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033; Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

116. *See* John Cloud, *For Better or Worse: In Hawaii, a Showdown over Marriage Tests the Limits of Gay Activism*, TIME, Oct. 26, 1998, at 43, 43. For a local post-election report, see Mike Yuen, *Same-Sex Marriage Strongly Rejected*, HONOLULU STAR-BULLETIN, Nov. 4, 1998, at A1.

tarian "outrage" that a state court had dared rule otherwise under the pre-1998 constitution.[117] As in "undemocratic" societies that this nation criticizes, these events illustrate how courts of law and constitutional provisions are manipulated or altered through cultural war to preserve ingroup privilege by force of law.

This resort to supremacist spectacle through majoritarian contest, in which essentialized majorities can taunt and overwhelm essentialized minorities in the name of democracy, has not always succeeded; sometimes voters rise above the base appeals of backlash initiatives, and sometimes the severity of these propositions makes even the dominant wing of today's Supreme Court recoil.[118] Nonetheless, these formally "democratic" spectacles spread cultural war from federal to state and local levels. They embroil state and local governments in cultural war to foreclose alternative social justice routes in the wake of the national government's capture by majoritarian backlashers.[119] Since 1980, lawmaking by backlash referendum has emerged as a fearsome and exhausting maneuver of cultural war, used effectively to circumvent and trump the reluctance of governmental bodies or officials to lash out affirmatively at sexual minority and other outgroup communities.

The second line of attack—the targeted exercise of the spending power—spans numerous legislative enactments that fund and/or defund programs specifically to hurt sexual and other minorities across a wide range of social issues. For example, governmental spending power has been used successfully since the 1979 symposium to withdraw and deny support for expression and performance by sexual minority artists, and as a way of suppressing sexual minority social visibility and denouncing publicly sexual minority culture and production of culture.[120] Similarly, the Defense of Marriage Act embraces the exclusion of sexual minorities from federally-controlled social, legal and economic benefits that inhere by law in formal marriage.[121] Funding for the HIV-AIDS pandemic, a

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117. For a contemporary, local account, see Liz Ruskin, *Gay Marriage Ban Approved*, ANCHORAGE DAILY NEWS, Nov. 4, 1998, at A1.

118. Perhaps the most notable example of ultimate failure was Colorado's Amendment 2, which was approved by mass vote but failed to pass muster either before the Colorado Supreme Court or the United States Supreme Court. *See generally supra* note 104 (discussing Colorado's Amendment 2).

119. *See generally* Justice Shirley S. Abrahamson, Divided We Stand: State Constitutions in a More Perfect Union (Nov. 14, 1990), *in* 18 HASTINGS CONST. L.Q. 723 (1991) (addressing search and seizure, free speech, and education in the context of state constitutions); Paula Brantner, Note, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495, 509–21 (1992) (examining the shift from a reliance on the federal Constitution to state constitutions in challenges to state sodomy laws following the *Hardwick* decision).

120. *See, e.g.*, Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1534–35 (1996).

121. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). *See generally* Evan Wolfson & Michael F. Melcher, *DOMA's House Divided: An Argument Against the Defense of*

gay-associated yet global health care crisis that erupted in the early 1980s alongside the rising tide of backlash, likewise has been belittled and neglected by legislative and budgetary mandarins since the onset of the plague, while funding for research and care remains today a contested federal priority.[122] More recently, the federal spending power has been used under the "Solomon II" amendment to mandate a loss of federal funding for student financial aid at law schools that deny on-campus access to at least one employer that discriminates both by policy and practice on the basis of minority sexual orientation: the United States Armed Services.[123] And, as with the organization of referenda, majoritarian misuse of governmental spending to wage cultural war is not targeted exclusively at sexual minorities; in this respect, as well as in others, control over the spending power extends to backlash lawmaking against outgroups based on race/ethnicity,[124] socioeconomic class[125] and sex/gender[126] as well.

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*Marriage Act*, 44 FED. LAWYER 30 (1997) (arguing that DOMA fails to comply with several provisions of the Constitution); Scott Rusday-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997) (arguing that DOMA impermissibly "nullifies" the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1).

122. Governmental non/responses to the HIV-AIDS pandemic have been critiqued from various quarters. *See, e.g.*, RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC (1987); Jean Reith Schroedel & Daniel R. Jordan, *Senate Voting and Social Construction of Target Populations: A Study of AIDS Policy Making, 1987–1992*, 23 J. HEALTH POL. POL'Y & L. 107, 116–27 (1998). *See generally* GLOBAL AIDS POLICY (Douglas A. Feldman ed., 1994).

123. *See supra* note 87 and sources cited therein.

124. Reinforcing the withdrawal of access to public goods effected through backlash referenda, *see supra* notes 111–19, legislative fiscal attacks against communities of color include the barrage of backlash statutes passed in 1996, on the heels of majoritarian victories in the 1994 midterm elections, which jointly deprive federal aid to many persons and communities in socioeconomic distress caused, in large part, by the legacies of racism, nativism, sexism or classism. *See supra* note 91 and sources cited therein.

125. The poor of all races, ethnicities, sexes and sexual orientations have been targeted for cultural war, in part by making them less able to exercise legal agency to pursue claims to rights. For instance, in 1997 and 1998 new regulations and legislation prohibited the Legal Services Corporation from filing class actions suits, or engaging in lobbying on behalf of welfare recipients, prisoners, migrant laborers and other vulnerable groups. 42 U.S.C.A. § 2996f(b) (1994 & Supp. 1998) The agency also is forbidden to provide any legal assistance in criminal proceedings, or in any proceeding to safeguard abortion rights, or in any proceeding to desegregate public schools. *Id.* In the past, legal services lawyers have been able to help poor persons vindicate some of these rights, but its budget has been slashed and its mandate has been contracted progressively since the 1980s, making this agency a less effective vehicle of social justice for the economically disadvantaged. *See generally* Talbot "Sandy" D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 FLA. ST. U. L. REV. 631, 635–36 (1998) (discussing the decline in Legal Services Corporation funding); Douglas J. Besharov & Paul N. Tramontozzi, *Background Information on the Legal Services Corporation*, *in* LEGAL SERVICES FOR THE POOR: TIME FOR REFORM app. A, at 209–25 (Douglas J. Besharov ed., 1990) (setting forth the legal, eligibility, funding, and procedural requirements of the Legal Services Corporation); Stephen Loffredo, *Poverty, Democracy, and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993) (arguing against the judicial relegation of the poor to the "rationality" standard inquiry); *supra* note 110 and sources cited therein on poverty law and social justice.

126. An early example in this identity category is the Hyde Amendment, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976) (codified as amended at 42 U.S.C. § 1396a (1994)) which cut off Medicaid funds to women in search of an abortion, and which has been revised and reenacted every

In these and other instances, majoritarian cultural elites have used their essentialized warriors actively to redirect governmental spending, aiming deliberately to dehumanize, stigmatize and invisibilize the nation's sexual and other minorities in both material and symbolic terms. The misuse of federal economic clout to dictate specifically sexual orientation inequality in various social settings seeks not only to obstruct the diffused experiments of varied institutions toward the ideal of a bias-free sociolegal environment, this misuse effectively seeks to coerce affirmative societal complicity in homophobic, indeed antihuman, beliefs and practices that work constantly to sow instability among sexual minority individuals, families and communities. The misuse of the federal spending power since 1979 confirms that cultural war and backlash lawmaking are bent on the sociolegal devastation and permanent repression of Queer and other outgroup life both in "public" and "private" sectors of society.

The third line of backlash attack—the reconfiguration of courts and doctrines—also has been pursued aggressively since 1979. Even though federal courts have been (and once again could be) run as principled instruments of social justice—specifically by protecting outgroups from majoritarian self-interest based on essentialized identity politics[127]—the majority elites who control the nation's judicial machinery refuse righteously to exercise that discretion now.[128] Instead, backlash judges and

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year in the annual appropriations bill(s) signed into law. This year's version is contained in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. 105-277, § 103, 112 Stat. 2681 (1999). The original version was upheld in *Harris v. McRae*, 448 U.S. 297, 326 (1980), by the majoritarian majority of the Supreme Court installed as part and parcel of cultural war. *See also* Maher v. Roe, 432 U.S. 464, 479–80 (1977) (approving legislation that provides governmental assistance for childbirth but not for nontherapeutic terminations of pregancy). Just this year, in the current version of this legislation, backlash leaders in Congress finished the task of choking off all federal funds that might facilitate women's access to reproductive rights: the media recently reported that the 1998 budget bill finally eliminated all federal funds for abortion. "Congressional anti-abortion forces, effectively, have cut off every path to abortion that involves federal money without actually criminalizing the procedure." Raja Mishra, *Package Cuts Back Federal Funds for Abortions*, MIAMI HERALD, Oct. 22, 1998, at 10A. This extinguishment is one of the social realities that cultural war produced legislatively this year, capping a multi-year campaign to implement this portion of the social agenda associated with the 1980s and 1990s triumphs of cultural majoritarianism.

127. Indeed, this insight—the distinctions and tensions between formal democracy and functional domination—was key to the landmark civil rights cases of this century. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 7–11 (1967); Brown v. Board of Education, 347 U.S. 483, 492–95 (1954). *See generally* Neal Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (arguing that the Supreme Court's historical and continued utilization of "color-blind" constitutional analyses ignores the practical effects of racial subordination); William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1 (1992) (elucidating the relevance of social reality to adjudication generally).

128. A recent, towering, and especially germane example is *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Supreme Court expressly opted for casual acquiesence to majoritarian preferences in the construction of sociolegal hierarchies. *See supra* note 14 (discussing the *Bowers* decision).

politicians have striven mightily during this cultural war to engineer majoritarian identity politics through judicial opinions;[129] majoritarian cultural warriors, including judges, have ensured that new judicial appointments most likely would yield new law through selectively "deferential" and "active" applications of judicial review as part and parcel of reclaiming ingroup cultural supremacy.[130]

Despite intonations of majoritarian platitudes on neutrality and democracy,[131] ingroup judges earnestly have intervened in key cases to align judicial authority and discretion with essentialized majoritarian backlash, selectively employing procedural and doctrinal devices to deny judicial relief for sexual and other minorities besieged by cultural war.[132] With the judicial process effectively closed to social justice

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129. Though judicial nominations and appointments always have been politicized, during the 1980s majoritarian backlash politicians have made them increasingly ideological. *See* Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319–20 (1989). As recent rulings indicate, the appointments of the last two decades effectively have reconstituted the federal judiciary, making it, and the law it produces, more hostile to antisubordination claims. *See, e.g.*, *infra* note 130 and sources cited therein.

130. Judicial discretion has been used by ingroup judges appointed to serve as juridical cultural warriors. These judges have tinkered with, and also revamped wholesale, doctrines and devices that tend to redress outgroup misery, reducing overall the possibility of actual or effective legal redress of outgroup social justice claims. *See, e.g.*, William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TULANE L. REV. 1485 (1990) (addressing the Court's doctrinal civil rights retrenchment in its 1989 term); Nancy Levit, *The Caseload Conundrum, Constitutional Restraints and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (critiquing the deployment of jurisdictional and prudential barriers to deflect civil rights claims); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 55 U. MIAMI L. REV. 191 (1997) (discussing the judicial decontextualization of cases to arrive at judicially preferred results); Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 405–45 (1994) (reviewing judicial manipulation of equality cases in military and governmental employment cases); Valdes, *supra* note 3, at 138–98 (questioning judicial inconsistency in the application of Title VII and equal protection doctrines); Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (analyzing the relative strictness of federal courts in analyzing the sufficiency of civil rights complaints). *See generally* DAVID G. SAVAGE, TURNING POINT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992) (describing the jurisprudential politics of the present-day Court).

131. A recent, transparent example is Justice Scalia's colorful dissent in *Romer v. Evans*, in which he chides the majority for "taking sides" in a "Kulturkampf" by subjecting Colorado's Amendment 2 to alive judicial review, and holding it unconstitutional. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); *see also supra* note 104 and sources cited therein (discussing *Romer*). *See generally* Robert P. Smith, Jr., *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153, 157 (1983) (reciting "the temptations of dishonest rationalization, misstatement of facts, disregard of impediments to a desired result, deliberate misinterpretation of precedent, misleading emphasis, and silence when explanation is impossible" as among the "factors external" to a case that nevertheless can help decide it).

132. The series of courtroom clashes over military policy during the 1980s and 1990s is a prime example. These cases witnessed not only civil rights advocates working tenaciously to halt military persecution of sexual minority servicemembers, but also ingroup judges gyrating doctrines, analyses and procedures to justify intellectually dishonest outcomes. For a critical review of judicial politics to preserve military homophobia in those cases and rulings, see Valdes, *supra* note 130, at 400–45;

claims by the proliferation of ingroup-identified judges and clerks installed during the 1980s precisely for their majoritarian social ideology, federal courts indeed have become increasingly aligned with majoritarian self-interest in the key issues of cultural war that they have chosen to settle. In sexual orientation cases, as in race/ethnicity, sex/gender and other categories of identity, cultural war has transformed courts into custodians of backlash to facilitate the decimation of outgroup communities.[133]

The three lines of attack summarized here thereby come full circle: majoritarian prerogatives over executives, legislatures and courts are exerted to ensure that all branches and levels of government succumb to their domestication as instruments of cultural war, and that they bow in policy and practice to the imperatives of retrenchment and supremacy. When any branch or government balks, resort to the spectacle of "popular" referenda can discipline hesitant officials. And when outgroups even think of appealing the unjust results of "democratic" or juridical pronouncements to a higher or supreme tribunal, they know that a majority of today's judges and justices have been seated precisely to rebuff their claims through rulings that etch onto the public record an ostensibly authoritative ridicule of legitimate social justice aspirations.[134] Perversely, as the increasingly slim chance of judicial rulings that might alleviate outgroup oppression is precluded, trivialized or nullified by backlash

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Kurt D. Hermansen, Comment, *Analyzing the Military's Justifications for its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151 (1992).

133. *See, e.g.*, Crenshaw, *supra* note 20; Freeman, *supra* note 68; *see also supra* note 130 and sources cited therein (discussing judicial retrenchment through doctrinal and procedural maneuvering). *See generally* Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984) (arguing that the courts have improperly limited equal protection review in sex discrimination cases by failing to recognize participatory discrimination as a valid avenue for relief). Judicial retrenchment forced by majoritarian appointments and backlash politics was brought into jurisprudential relief by Justice Blackmun shortly before his retirement from the Supreme Court. In his separate opinion in *Planned Parenthood v. Casey*, 505 U.S. 803 (1992), Justice Blackmun begins by noting that "four Justices anxiously await the single vote necessary" to rollback reproductive rights judicially, *id.* at 922, and alludes to majoritarian backlash efforts designed to truncate reproductive rights through new judicial appointments: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before [the Court in *Casey*]. That, I regret, may be exactly where the choice [over the preservation of privacy rights for women] will be made." *Id.* at 943. This sentiment is made poignant by knowledge of the social climate of violence and intimidation that increasingly has surrounded women's efforts to exercise reproductive rights during the intensifcation of this cultural war. *See, e.g., supra* note 110 and sources cited therein (discussing physical attacks against reproductive health care providers).

134. This knowledge leads to the abandonment of social justice efforts and experiments, or legal claims based on them, due specifically and explicitly to this knowledge. For a very recent instance, see *Boston Drops Fight to Retain School Quotas*, MIAMI HERALD, Feb. 5, 1999, at 15A (reporting the decision of the Boston School Committee to abandon litigation and dismantle equal opportunity educational policies "because an unfavorable Supreme Court decision could have undone such programs around the country").

maneuvers, legislative and other majoritarian venues become correspondingly crucial to the vindication of outgroup social justice claims.[135]

Since 1980, the coordinated attacks pursued along these three lines of lawmaking have converged to reverse the advance of sociolegal reformation, endeavoring also to instill a general sense of permanent stratification backed both by formal law and social terror.[136] Events since the 1979 symposium thus make plain that one concrete purpose of majoritarian backlash is to secure substantial dominion over lawmaking, rendering law a compliant tool of supremacist identity politics. This purpose, as the above synopsis illustrates, has been largely met: though majoritarian retrenchment remains vigorously contested on various policy fronts, the current state of public affairs indicates that majoritarian backlash politics now permeate every lawmaking process. Because this permeation is sustained and driven by self-interested majoritarian essentialism, social justice legal scholars must help to devise an outgroup counter to that particular employment of ingroup identity in the specific context of cultural war. This scenario makes it imperative for sexual orientation legal scholars to reckon with the power of essentialized majoritarianism, and to maximize the potential of critical legal scholarship in tranquilizing its deployment to wage cultural war through backlash lawmaking.

### F. *Identity Politics, Majoritarian Subordination & Strategic Quasi-Essentialism*

To counter majoritarian essentialism, outgroup scholars should proceed from a clear understanding that today's cultural war is not the first time that majoritarian identity politics have catalyzed sociolegal stratification through lawmaking prowess. On the contrary, as this symposium illustrates, this nation's social and legal history is replete with examples that confirm the power and abuse of essentialized identities to use law for the design and imposition of social hierarchy.[137] Indeed, identity politics

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135. These and similar concerns have drawn scholarly attention, but no respite. *See generally* Robin Charlow, *Judicial Power, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

136. For instance, in each category of sociolegal identity sketched here, cultural war combines daily microagressions with eruptions of physical violence, the hyperbolic rhetoric and aims of majoritarian referenda, the ongoing legislative attack on governmental provision of social assistance, and the selective exercise of judicial appointments and review to push retrenchment, thereby producing a cumulative effect that literally conjoins social terror and formal lawmaking in the pursuit of majoritarian backlash.

137. Susan Sterett explores the historical nature of essentialized identities and their use in defining and imposing sociolegal hierarchy through her examination of state benefits. Susan Sterett, *Husbands & Wives, Dangerousness & Dependence: Public Pensions in the 1860s–1920s*, 75 DENV. U. L. REV. 1181 (1998). Avoiding the more common approach of addressing gay and lesbian identity issues through an examination of "sexual orientation," Sterett instead analyzes historically essentialized "male" and "female" constructs within heterosexuality, as defined and strengthened by public pension law. *See id.* Similarly, Karla Robertson examines and challenges the heteronormative construction of marriage in her contribution to this symposium. Karla C. Robertson, Note, *Pene-*

among both majorities and minorities were foreseen by key founders of the nation as an inevitable source of factionalism in majoritarian law-making within the new country.[138] Since then, various majorities have employed identity essentialisms to subjugate various minorities: white supremacy, male supremacy and straight supremacy historically have relied on essentialized identities to enact legal regimes that help(ed) maintain social hierarchy, even while the targeted minorities employ(ed) a similar counter-essentialism to rally resistance against subjugation.[139]

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*trating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory*, 75 DENV. U. L. REV. 1375. Viewing case law and statutes through the lens of bisexuality, Robertson uncovers the conduct-based centrality of penis-vagina penetration as the essential prerequisite for legal recognition of marriage. *See id.* 1377–96. Robertson goes on to argue, notwithstanding this conduct-based conception of marriage, that courts and Congress improperly essentialize "marriage" through the status-based construct of heterosexuality, reifying heterosexual sexual identity and its accompanying privileges. *See id.* 1400–08. The power of history and essentialism likewise is underscored in Jane Schacter's commentary in this symposium, where she argues that proposals such as Ertman's, *see supra* note 61, may have the unintended consequence of reinforcing the essentialized construction of heterosexual marriage that both Robertson and Sterett address. *See* Jane S. Schacter, *Taking the InterSEXional Imperative Seriously: Sexual Orientation and Marriage Reform*, 75 DENV. U. L. REV. 1255 (1998).

138. For instance, in the Federalist No. 10, James Madison addresses the "unequal distribution of property" as the "most common and durable source of factions" that cause the division of society among various groups. THE FEDERALIST NO. 10, at 18 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966). He notes: "Those who hold and those who are without property have ever formed distinct interests in society." *Id.* When a majoritarian society uses law formally to correlate essentialized identity features such as race or sex to the ability to acquire property, as has been the case for the better part of this country's history, this sort of factionalism effectively is converted into a form of majoritarian identity politics. Functionally, this correlation still is a fact of life in this society. *See, e.g.*, Roy L. Brooks, *The Ecology of Inequality: The Rise of the African-American Underclass*, 8 HARV. BLACKLETTER J. 1, 3–4 (1991). Madison also recognized more directly how identity politics figure into factionalism; focusing on a particularly problematic identity feature of his era, religion, Madison similarly notes in the Federalist No. 10 that "different opinions concerning religion," like unequal distributions of property, disposed humans to "vex and oppress each other." THE FEDERALIST NO. 10, at 18 (James Madison). Similarly, but more nakedly, Benjamin Franklin practiced identity politics based on nationality, ethnicity and language when he sought to subordinate German identity to English identity in the new nation. *See* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992). Clearly, this nation was founded on a recognition, acceptance and practice of essentialist identity politics by those in control of the founding.

139. Perhaps the most egregious example is race-based slavery and the Jim Crow regime that followed racial slavery's formal abolition after the Civil War. In those essentialist schemes, all persons of one "white" "race" were deemed innately and uniformly superior to all persons of other "races." Pithily encapsulating racial essentialism from a white supremacist perspective, Chief Justice Taney pronounced in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), that Africans and blacks "had for more than a century before been regarded as beings . . . so far inferior, that they had no rights which the white man was bound to respect." *Dred Scott*, 60 U.S. (19 How.) at 407. Both before and after slavery's formal end, essentialist concerns about racial purity and hierarchy governed majoritarian identity politics. *See generally* Barbara K. Kopytoff & A. Leon Higginbotham, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968 (1989) (discussing the approach to racial purity and interracial marriage before and after the Civil War); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1163 (1997) (discussing racialized anxieties defined by ancestry and blood line). However, the activation of essentialism in majoritarian

Majoritarian essentialism that deployed law formally and with virtual impunity through the first half of this century to subordinate vulnerable minority groups easily ranks among the most abusive examples of identity politics yet recorded in this nation's history.

But history, like discourse, is not a static phenomenon. Though still stratified, society is no longer frozen formally along strictly essentialist lines that spotlight relatively simplistic identifications attributed to race, sex/gender, sexual orientation or other identity features. The erosion of formalized majoritarian essentialist regimes, and the intricacy of social forces associated with that erosion, have opened fissures that further complicate identity politics among outgroups—complications that multiplicity and intersectionality effectively seek to highlight.[140] Sociolegal stratification based on identity, though still anchored to essentialist structures and their vestiges, thereby has become a more complicated phenomenon; even while essentialism continues to drive majoritarian privilege and prejudice, the years since the 1979 symposium have seen a gradual decline of identity essentialism as a reliable basis *specifically for social justice solidarity among outgroups*. In a postmodern and heterogeneous society such as this one, sharing one or a few identity features cannot provide a sturdy basis for antisubordination solidarity, much less for social justice coalitions that span intra- as well as inter-group diversities.

More to the point, the activities and pronouncements of Clarence Thomas blacks, Linda Chavez Latinas/os and Log Cabin Republicans—who advocate analyses of law and society that belittle the present importance of majoritarian power relationships based on essentialized identities—have demonstrated beyond any significant doubt how mere "identity" is unreliable as a basis of outgroup antisubordination

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identity politics to subordinate minorities extends to sex/gender and sexual orientation categories as well. Thus, in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), Chief Justice Reynolds essentialized sex (and gender) in concurring that the state could prohibit all married persons of one sex from receiving a license to practice law because "divine ordinance" dictated that the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Bradwell*, 83 U.S. (16 Wall.) at 141. To this day, the United States Armed Services, with the full complicity of the nation's courts, continue to essentialize minority sexual orientation by effectively ordaining all lesbian and gay persons as innately unfit for military service. *See* Valdes, *supra* note 130, at 465–74.

140. *See supra* Part C. In this symposium, Nan Boyd's article on the commodification of gay and lesbian identity illustrates how multiplicity and intersexionality may illuminate intragroup issues of difference and diversity, thereby complexifying "sexual orientation" communities, issues, and agendas. Nan Alamilla Boyd, *Shopping for Rights: Gays, Lesbians, and Visibility Politics*, 75 DENV. U. L. REV. 1361 (1998). Boyd critiques the notion held by many within the gay rights movement (including to some extent, myself, *see* Valdes, *supra* note 81) that increased visibility (through means such as mainstream advertising) promises increased acceptability and, hence, increases in civil rights. *Id.* at 1363–65. Without accepting or conceding that increased visibility must result in Queer homogenization and hierarchy, Boyd effectively argues that mainstream advertising oblivious to multiplicity and intersectionality may cause shortcomings tending to alienate members of the movement based upon gender, race and class, thereby "deepening the gulf between privileged and non-privileged queers." *Id.* at 1371.

affinity.[141] By telling black people and other minorities, including sexual minorities, that identity no longer matters much, either legally or socially, Clarence Thomas and his ilk disable minority identities specifically as a means of forging antisubordination consciousness. Yet they rarely pause to interrogate how entrenched majorities, including the (hetero)sexual majority, continue to play on majority identities and privileges as a means of majoritarian bonding and essentialized domination. In this way, identity has become a basis for enjoying the privileges of domination and a taboo for rallying resistance to domination.

The point of this critique is not to argue that all or most outgroup social justice analyses should agree with each other. The point is not the promotion or acceptance of *any* essentialized analysis. The point is that essentialized identifications inform *all* outgroup re/actions in the context of today's cultural war precisely because essentialized identity drives majoritarian backlash and cultural warfare; neither outsider legal scholars—nor Clarence Thomas blacks, Linda Chavez Latinas/os and Log Cabin Republicans—can extricate ourselves unilaterally from the cultural conflicts that pervade our social and legal environments; we cannot exercise social or legal agency without becoming implicated in the essentialized and politicized conflicts of majoritarian cultural war. To act as if we could is to be reckless with the sociolegal wellbeing of the outgroup communities from which we hale, and for whom we professedly seek to make the world a better place.

On the contrary, Queer and allied scholars must recognize the resonance of identity, and the reasons behind essentialist identity politics, among outgroups: resilient presumptions of quasi-essentialist affinity among outsider communities are reinforced precisely by the fact that disfavored identity features still serve as a primary basis for the structural and social mistreatment of humans by other humans.[142] Outgroups exhibit

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141. I employ these figures as tropes for a particular type of mentality about identity and position in today's cultural war, which is described in the text above. *See supra* notes 67–100 and accompanying text. In each of these three instances, the essentialized figure is outgroup-identified but, in each instance, the same figure aligns with majoritarian-identified positions on issues of cultural war. In each instance, this mentality and its public expression have helped drive career advancement and generate celebrity status. The identity and power dynamics suggested by this trio of figures suggest that outgroup essentialism is a thin reed for expectations of social justice affinity during a cultural war. *See generally* Ellis Cose, *The Obligations of Race*, TIME, Aug. 10, 1998, at 53. For a sampling of identity/power tidbits about these figures, see *Marching to a Different Drummer*, TIME, July 15, 1991, at 18 (discussing Clarence Thomas's ascension to the Supreme Court and providing excerpts of Thomas's remarks regarding issues such as racism and affirmative action); *Clarence Thomas Says: "I'm No Uncle Tom,"* JET, Nov. 14, 1994, at 4; Stephen Goode, *Civil-Rights Conservative Chavez Stirs Up the Melting-Pot Issue*, INSIGHT MAG., July 21, 1997, at 18; Jack E. White, *Says He's Nobody's "Slave," But Clarence Thomas Has a Master: The Right Wing*, TIME, Aug. 10. 1998, at 64.

142. Of course, outgroup essentialism also can be fostered by a sense of shared culture or similar points of connection that in some ways can be related to identity. This point is one area of exploration within LatCrit theory. *See generally infra* note 161 and sources cited therein. Without

essentialist susceptibilities in part because ingroup exploitation of essentialized identities invites and requires it. This reactive affinity among outgroup individuals and communities is, at least in part, a product of majoritarian essentialism in today's cultural war.

For instance, majority-identified humans, such as those who allegedly murdered Matt Shepard, mistreat and sometimes murder minority-identified humans precisely because they are identified as "different" in a way that still is imbued with social, legal and political essentialism.[143] This continued abuse of majoritarian identity in turn causes the mistreated humans to identify with each other on the basis not merely of the targeted trait but, more importantly, on the basis of the social significance given to it and the experience with mistreatment that it incites: this experience can lead to struggle against continued mistreatment, and in this struggle persons and groups who may have been similarly mistreated due to a similarity of identity may tend to gravitate toward each other for solace and alliance.[144] Historically and presently, majoritarian essentialism directly fuels outgroup essentialism in the politics of identity and equality. Thus, despite the rise of multiculturalism and postmodernism, essentialist identities and outgroup experiences with majoritarian power continue to be correlated in social life, thereby prolonging outgroup disposition to essentialism.

Of course, humans who share the sexual orientation of Matt's alleged murderers do not automatically share a murderously homophobic antipathy for those who share Matt's sexual orientation. And similarly, not all of those who share Matt's sexual orientation share his experience, or fatal fate. Due both to the multiplicity of human identities and other vagaries of life, the basic equation of identity, experience, consciousness and reaction is much more volatile: identity, experience and politics, though still substantially correlated in a multicultural and postmodern society, are neither neatly nor necessarily one and the same. This disjunction helps to explain the existence of Thomas Clarence blacks, Linda Chavez Latinas/os and Log Cabin Republicans, whose reactions to identity and experience in the specific context of cultural war illustrate and magnify the uncertainty of simplistic correlations.[145]

But this complex interplay of identity, experience and consciousness also helps to explain the present power of outgroup essentialism: *A*

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slighting this observation, the point of this analysis is that supremacist majoritarian essentialism, and mistreatment of outgroups based on that essentialism, specifically reinforce essentialist tendencies within the similarly mistreated members of outgroups.

143. *See supra* notes 62–69 and accompanying text.

144. *See generally* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) (arguing for the revitalization of the "black community" through a "politics of identification"); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994) (describing shared victimhood and struggle as a basis for solidarity).

145. *See supra* note 141 and accompanying text.

*shared feature of identity continues to suggest, even if it does not make certain, a shared experience with (or reaction to) the abuse of privilege and infliction of injustice.* The coexistence of Clarence Thomas blacks and white privilege, as well as analogous phenomena, thus depict the complexity of social experience and conscience in this society at this time. In this postmodern era, a shared sexual orientation—or race and gender—therefore can at best suggest only a strategically quasi-essentialist presumption of collaborative inclination toward antisubordination goals.

By strategic quasi-essentialism[146] I mean a careful re/calibration, in part through multidimensional critical legal scholarship, of group power relations that recognizes the power of "identity" to ensure that "identity politics" develop, rather than displace, antisubordination purpose. Strategic quasi-essentialism is a method of legal scholarship and praxis that recognizes the coexistence of essentialism and postmodernism in public affairs, and which seeks to manage on behalf of social justice the complexities of diversity and solidarity in a majoritarian order.[147] Strategic quasi-essentialism is valuable both to intra- and inter-group antisubordination efforts that encompass varied *and* overlapping identity categories.

This form of outgroup quasi-essentialism is strategic precisely because it uses identity only as a point of departure for antisubordination commitment and as the basis of outgroup collaboration. And antisubordination purpose is elemental to multidimensional discourse because it provides an organizing principle for social justice scholarship and praxis—a principle with heightened importance in the midst of cultural war. Multidimensional analyses that incorporate both antisubordination purpose and strategic quasi-essentialism are crucial because, in time, they also may come to elaborate a capacious vision of a postsubordination order that is not only a politically viable alternative to the majoritarian status quo but, more importantly, a regime of egalitarian justice facilitated by law.[148]

### G. *Multidimensional Scholarship's Relevance to Social Transformation*

To be sure, this Afterword is not the first time that attention to majoritarian lawmaking has been urged in sexual orientation legal scholarship.[149] But the key linkage stressed here is the relationship between es-

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146. *See* Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 HARV. LATINO L. REV. 307, 311 (1997) (suggesting "strategic" essentialism as outgroup antisubordination method).

147. *See* Harris, *supra* note 144, at 759–63.

148. For elaboration of postsubordination vision as jurisprudential method, see Valdes, *supra* note 51.

149. *See, e.g.*, William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality?: Some Reflections on the Construction of the Hate Speech Debate from a Lesbian/Gay Perspective*, 2 LAW & SEXUALITY 19, 19 (1992).

sentialist majoritarian lawmaking and multidimensional legal scholarship in the specific context of today's cultural war: under prevailing sociolegal circumstances, multidimensional analysis is more likely than unidimensional analysis to produce effective interventions in contemporary lawmaking based on majoritarianism and essentialism because multidimensionality can help to connect various "minority" aspirations that, on their own, stand relatively little chance of success in majoritarian contests dominated by essentialized backlash and elitist self-interest. Multidimensionality is one means toward the social relevance of antisubordination legal scholarship, especially when operating under the political onslaught of self-interested majoritarianism filtered through essentialized appeals to the relevant majority.

Multidimensional analyses are better suited to the antisubordination needs of diverse minorities seeking justice from a majoritarian "democratic" system because they can help to illuminate the bases for interconnection and collaboration among minority outgroups to help all minorities withstand the pressures of majoritarian cultural aggression. And by "minorities" I mean both minorities within sexual minority communities as well as beyond them; I mean, for instance, members of sexual minorities who do not share Matt's race/ethnicity and sex/gender privileges as well as women, racial/ethnic minorities, and other subordinated outgroups who identify as members of the sexual majority. Multidimensional frameworks are important in a society still gripped by majoritarian essentialism as the dominant form of identity politics because they help not only to map, but to explain, the ethics of a functional, as opposed to merely formalist, social consensus on the principle that identity should never be used to subordinate, whether identity is based on race/ethnicity, sex/gender, sexual orientation or some other essentialized feature of personhood and regardless of whether it is secured by "democracy."[150]

By mapping and explaining the interconnected structuring of subordination, multidimensional analyses can help to frame and justify a cor-

150. A similar consensus was previously organized around the antidiscrimination principle and the notion of equal citizenship. Indeed, this nation regards itself proudly bound to, and the prime champion of, principles of equality and nondiscrimination. *See generally* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976) (examining the history of the "antidiscrimination principle" by which classifications and decisions based upon race are disfavored); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) (examining the constitutional origins and development of equality principles). These principles, even as aspirations, certainly are incompatible with the brute exercise of majoritarian power through backlash lawmaking and cultural warfare that includes social terror. *See supra* Part E. The tension between democracy and equality therefore generally has been palpable in the controversies that surround sexual minority social justice claims. *See, e.g.*, Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, U. CHI. L. REV. 1161, 1170–78 (1988); *see also supra* note 14 and sources cited therein (discussing equality law and sexual orientation).

responding structuring of antisubordination resistance.[151] By showing how different forms of bias travel together and combine in social operation,[152] multidimensional analysis may begin to unite multiply diverse outgroups and persuade skeptics that all forms of discrimination based on essentialized identification are wrong for the same reason: they subvert the national commitment to equality, liberty and justice, spreading instead human suffering, as well as social dysfunction and disharmony.[153] Progress no doubt will be fitful and incremental, and sometimes perhaps even mostly symbolic, but insisting on multidimensionality in sexual orientation scholarship will better position Queer and allied scholars to help ensure that majoritarian lawmaking on the whole will be more receptive to legal reform toward social justice for multiply diverse outgroups. Without being sanguine about capacity, we can persist through multidimensional scholarship and praxis in the accumulation of momentary, but perhaps enduring, social justice gains. But the efficacy of the prospective evolution toward multidimensionality in sexual orientation discourse that is suggested by this symposium and its counterpart depends ultimately on a recognition of both the need for solidarity and the fact of diversity within and beyond sexual minority communities.

### H. *Diversity, Solidarity & Critical Coalitions in Multidimensional Analysis*

Despite their insight and promise, these symposia represent but a first step toward a focused yet multidimensional legal discourse on sexual orientation. The balanced evolution that these symposia indicate, and hopefully initiate, bring to the fore serious and complicated issues: not

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151. Karen Engle takes a step in this direction with her article in this symposium. *See* Engle, *supra* note 20. Using gay rights issues as a case in point, Engle argues that backlashers' conflation of "equal" and "special" rights affects not only the gay rights debate, but implicates all civil rights struggles. *Id.* at 1270–81. Rejecting the implied premise of backlashers that "special" rights are necessarily destructive, Engle's analysis shows why multidimensional antisubordination scholarship must transcend the inherited boundaries of essentialist identity formations. *See id.* at 1291–1301.

152. The interconnected nature of social prejudice based on "different" identity features, such as race/ethnicity and sexual orientation, is captured vividly in the multidimensionality of the bigotry embodied by Matt Shepard's alleged murderers. *See supra* note 62–69, 143 and accompanying text. For a sample of studies that document the interconnection of biases based on sexual orientation, sex/gender and race/ethnicity, see Valdes, *supra* note 3, at 55 n.148; *see also* Thomas J. Ficarrotto, *Racism, Sexism, and Erotophobia: Attitudes of Heterosexuals Toward Homosexuals*, 19 J. HOMOSEXUALITY 111, 115 (1990) (finding that racism, sexism and erotophobia are "independent and equal predictors of antihomosexual sentiment"). For a critical review of the same interconnection, see Clark Freshman, Whatever Happened to "Anti-Semitism?": Generalized Discrimination, Proof of Discrimination, and Social Science (unpublished manuscript on file with author); *see also* Clark Freshman, Note, *Beyond Atomized Discrimination: Use of Acts of Discrimination Against "Other" Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43 STAN. L. REV. 241, 269 (1990).

153. *See generally* Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN-PAC. AM. L.J. 33, 35 (1995) (urging that a "multidimensional concept of interracial justice is, in many instances, an integral, although often overlooked component of peaceable relations and coalition-building among racial minorities").

only must we balance a focus on "sexual orientation" with an intersectional and multidimensional expansion of sexual orientation discourse, we also must do so in a way that balances diversity with solidarity to produce social change in a majoritarian and "democratic" system. We must, in other words, pursue a successful engagement with a threshold postmodern issue that to date has eluded outsider legal scholars generally: balancing human complexity and social heterogeneity in a scholarship of antisubordination solidarity.

The move to multidimensionality thus conjures the lingering "sameness/difference" dilemma that has preoccupied outsider scholars in recent years—a dilemma that has spurred attempts to accommodate diversity and cultivate solidarity to advance social justice through increasingly multidimensional analysis.[154] Solidarity in diversity has been elusive specifically within social justice discourse and projects because this balance requires both the recognition and accommodation of relevant commonalties and diversities to advance antisubordination discourses, projects or agendas. To transcend this sense of dilemma, antisubordination scholarship on sexual orientation must dedicate itself to the development of means that will enable multiply diverse sexual minorities (and other multiply diverse outgroups) to evaluate critically how claims of solidarity and diversity may tend to advance social justice goals and/or replicate existing patterns of privilege.[155] A panacea for this need to discern has yet to be found but—again—the work of critical race and other outsider theorists provides some promising, if imperfect, apertures.

Scholars identified with outsider jurisprudence have urged in recent years that antisubordination projects must be "grounded" in social context to ensure the practical relevance and transformative potency of critical legal scholarship. In addition to engaging multiplicity and intersectionality, Queer multidimensional scholarship persistently and progressively must "look to the bottom"[156] and "ask the other question(s)"[157] to

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154. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 15 (1990) (exploring conceptions of "difference" within the American legal system and advocating "a shift from a focus on the distinctions between people to a focus on the relationships within which we notice and draw distinctions"); Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877, 878 (1992) (noting that "sameness," "difference," and "deviance" are mechanisms or tools that women use to define the black community); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1 (1992) (noting the implications of legally relevant differences between men and women); Joan Chalmers Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 299 (advocating a post-modern approach to sameness and difference as a stable set of "essential" differences will disappear in that analysis).

155. *See generally* Jerome McCristal Culp, Jr., *Latinos, Blacks, Others, and the New Legal Narrative*, 2 HARV. LATINO L. REV. 479 (1997) (arguing that outsider scholarship must not accept the racial or identity status quo as a starting point for discussion).

156. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) ("[A]dopting the perspective of those who have seen and felt the falsity of the liberal promise can assist critical scholars in the task of fathoming the phe-

help contextualize social justice issues in intra- and inter-group frameworks. Queer and allied scholars consciously must choose, and then continue, to engage sameness/difference issues with interconnective,[158] cosynthetic,[159] wholistic[160] methods and mindsets. By practicing and disseminating these and other postmodern techniques of critical analysis, we can bring into existence a multidimensional sexual orientation legal discourse to help empower multiply diverse sexual minorities; through sexual orientation multidimensionality, we can help to foster intra- and inter-group appreciation of both outgroup similarities and differences in a way that enables successful interventions in majoritarian and "democratic" lawmaking.[161] Despite our human faults and frailties, Queer and allied scholars jointly can help to create a progressive balancing of diversity with solidarity to promote and expand antisubordination transformation.

The methods of outsider jurisprudence thus should be applied not only to ground critical theory generally, but also with the specific aim of establishing viable frameworks of intra-and inter-group collaboration in majoritarian and "democratic" processes or venues through the design of

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nomenology of law and defining the elements of justice."). In this InterSEXionality Symposium, Patricia Cain exemplifies both the application and the effectiveness of "looking to the bottom" in "sexual orientation" context through her examination of the lives of individual transsexuals. *See* Cain, *supra* note 66.

157. *See* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) ("asking the other question" as a method of understanding all forms of subordination).

158. *See* Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 26 (1995) (defining interconnectivity as "a call for a new found appreciation of the situational commonalties that frame the histories" of sexual minorities).

159. *See* Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280 (1997) (defining cosysthesis as "a dynamic model whose ultimate message is that the multiple categories through which we understand ourselves are sometimes implicated in complex ways with the formation of categories through which others are constituted").

160. *See, e.g.*, e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 500 (1998) (defining wholism as a "theory of radical individualism" without intersections).

161. This description is apt for the ambitions that LatCrit theorists have undertaken in recent years. *See* Francisco Valdes, *Foreword: Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1111 (1997); *see also* Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. (forthcoming 1999); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 UCLA CHICANO-LATINO L. REV. 1 (1998); Colloquium, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 1 (1997); Symposium, *LatCrit: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997); Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996). For a comparison of critical race theory, gay and lesbian scholarship, and LatCrit theory, see Valdes, *supra* note 51.

critical coalitions.[162] By "critical" coalitions I mean "alliances based on a thoughtful and reciprocal interest in the goal or purposes of a coalition," as opposed to partnerships skewed in favor of one partner over others in ways that are structural or persistent rather than strategic or momentary.[163] Critical coalitions therefore require a commitment to a "rotation of centers" that ensures thoughtful distribution of attention and energy to pursue efficiently the social justice interests of all coalition partners as coalition partners. This rotation correspondingly requires all partners to accept a partial and periodic de-centering of immediate or unidimensional self interest: in this scheme, coalitional resources and priorities rotate along with the center, and as part of a vision geared to balancing and harmonizing the goal of social justice for all. Of course, critical coalitions, like all human endeavors, depend on their execution for their success. But the bedrock of a critical coalition is that no single identity or interest ever will rise to the level of domination, much less hegemony. This concept applies always and simultaneously both to the intra-[164] and inter-[165] group aspects of these coalitions.[166]

To articulate intra-sexual minority diversity and solidarity, Queer and allied scholars must engage the process of discovering how race/ethnicity, class, dis/ability, geography and religion, as well as sex/gender, intersect and interact with sexual orientation to produce varied layers and experiences of social life and legal opportunity for lesbians, gays and other sexual minorities. To mobilize intra-sexual minority coalitions we must craft a scholarship that both maps points of connection and tempers axes of contention. We must emphasize how sexual orientation discrimination affects us all while we recognize and interrogate how that discrimination is made variable for "different" members of sexual minorities by the other identity factors that make us richly diverse. Though delicate and daunting, our task is to register the ways and means through which interlocking structures of subordination deprive multiply diverse sexual minorities of social justice and legal rights both differently and commonly. Only in this way can sexual minorities exert our full power and potential to promote just laws and lawmaking.

To delineate inter-group coalitions, Queer and allied scholars similarly must dedicate ourselves and our scholarly labors to understanding and charting how straight supremacy, white supremacy, male supremacy

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162. *See* Elizabeth M. Iglesias & Francisco Valdes, *Afterword—Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis*, 19 UCLA CHICANO-LATINO L. REV. 503 (1998).

163. Valdes, *supra* note 51; *see also infra* note 179 and accompanying text.

164. By intra-group aspects of critical coalitions I mean collaborative efforts that cross lines of class, gender, color, geography and region within the internally diverse communities that make up the sexual minority population of this country.

165. By inter-group aspects of critical coalitions I similarly mean collaborative efforts that cross sexual orientation lines—those that help to coalesce sexual minorities and the sexual majority around the project of social justice, equality and harmony for and among *all* sexual orientations.

166. Valdes, *supra* note 51.

and other hierarchies supported by law directly and indirectly interlock to produce the manifold injustices perpetrated by the continued domination of Euro-heteropatriarchy within our communities, throughout the United States and, ultimately, the world. The same substantive and strategic considerations should help to inform and guide social justice scholarship on intra- as well as inter-group issues.[167] To develop critical coalitions that remain true to social justice transformation both within and among traditionally subordinated groups, our scholarship must be informed by knowledge of, and fidelity to, the lived conditions that materially represent the range of social injustices that we purport to combat and seek to reform. Only in this way can overlapping outgroups combine strengths and resources to make a difference on majoritarian and "democratic" terms.

Thus, even while recognizing our limits, our responsibility as antisubordination scholars remains constant: to devise conceptual frameworks that may help foster a culture of understanding and coalition among multiply diverse and overlapping outgroups as one means toward effective and efficient outgroup reform agendas. This responsibility is recognized throughout this symposium. Indeed, much of the power and promise projected by the works presented in this symposium come from the fact that they respond to this responsibility—the responsibility to activate the power of identity for social justice on behalf of multiply diverse sexual minorities.[168] As in this symposium, Queer legal theory must be animated and measured by its responsiveness to our collective responsibility for advancing antisubordination collaboration among groups that otherwise might not appreciate how critical outgroup coalitions are a predicate for materializing social justice through legal reform. This responsibility can be met, as well as measured, on at least four levels of discourse.

## I. *Levels of Multidimensionality to Ground Queer Legal Theory*

The efforts of various outgroup legal scholars to construct an antisubordination discourse has produced insights, such as multiplicity and intersectionality, that point the way toward multidimensionality.[169] These efforts, coupled with related insights produced since 1979 through outsider jurisprudence,[170] in turn suggest four levels of multidimensionality that should be palpable in a Queer legal theory as a form of social justice legal scholarship that incorporates both intra- and inter-group issues of sameness and difference, and that engages these issues with antisubordination purpose. These are:

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167. *See* Valdes, *supra* note 26, at 1321–25.

168. *See* Symposium, *InterSEXionality*, *supra* note 4; *see also supra* notes 20, 29, 53, 61, 66, 137, 140, 151, 156 (addressing ideas presented in this symposium).

169. *See supra* notes 21 and 39–40 and accompanying text.

170. *See supra* notes 158–60 and sources cited therein.

1. The first is a focus on "sexual minorities"[171] as a distinct but multiply diverse and transnational social group, and, more specifically, on this diverse group's relationship to law or current legal regimes/practices. This first level of multidimensionality flows directly from well-established insights, like multiplicity and intersectionality.[172] The idea, therefore, is to "center" sexual minorities qua sexual minorities in legal discourse, but to do so in a way that recognizes and accounts for the many axes of diversity that help to define sexual minority commonality and heterogeneity, both domestically and internationally. In this way, this first level helps both to focus the discourse as well as to texture it. Through this effort, the social and legal significance of intra-sexual minority "sameness" and "difference" might come to be better understood to aid antisubordination purpose.[173]

2. The second level is geographic specificity, delineated by political or sociolegal units such as a neighborhood, city, state, or nation, that provide material frames for analyses of law and life.[174] This second level, like all other schemes of analytical classification, is adjustable to varying degrees of generality. The idea, however, is to use geographic or regional specificity to promote critical awareness and comparative analyses of different social in/justice histories, dynamics and conditions at different sites or locales.[175] Focusing on sexual orientation, this second level of multidimensionality is counseled by the transparent disparities between Matt's Wyoming and the sociolegal conditions prevailing in, say, San Francisco's Castro District—or, for that matter, in other parts of the globe.[176] This effort, like the first level of multidimensionality, produc-

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171. For a brief explication of this category and its utility as a unit of analysis, see *supra* note 5.

172. *See supra* Part E.

173. *See supra* note 154 and accompanying text.

174. *See, e.g.*, Darren Rosenblum, *Geographically Sexual? Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119 (1996) (focusing on New York City Council redistricting to argue for the viability of proportional representation to support sexual minority interests). *See generally* Keith Aoki, *Race, Space and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699 (1993) (critiquing the gentrification of United States housing markets); John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope From a Mountain of Despair,"* 143 U. PA. L. REV. 1233 (1995) (advocating the building of a "culture of resistance" through grass roots movements grounded in lived experience and concrete social conditions); Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, *in* CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS, *supra* note 36 (analyzing the role of law in creating racialized social places and the role of critical theory in redressing the injustices thereby perpetrated); Martha Mahoney, Note, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251 (1990) (examining racisim through the location and construction of public housing in New Orleans).

175. This idea is a key feature of the LatCrit conferences and symposia that were initiated in the mid-1990s. *See generally supra* note 161 and sources cited therein.

176. News reports of Matt's murder generally described Wyoming as markedly inhospitable to sexual minority life; it is, the media reports, "tough business . . . to be gay in cowboy country." Lopez, *supra* note 62, at 38. San Francisco's Castro District, on the other hand, is widely regarded as one of the most developed sexual minority neighborhoods in the world. *See generally* RANDY

tively can inform scholarly and activist understanding of sexual minority sameness/difference issues, highlighting those that are caused or complicated by geographic or regional dis/continuities in law and society.

3. The third level is a persistent exploration or elucidation of cross-group histories or experiences with law and power, such as those based on race/ethnicity, socioeconomic class, sex/gender, sexuality and religion. The idea of this inter-group focus is to ensure that Queer legal theory, in addition to incorporating intra-sexual minority diversities, also contextualizes sexual orientation issues in inter-group frameworks.[177] This effort thus is related to the first, and similarly flows from well-established outsider insights. However, this third level of multidimensionality carries into cross-group terrain the effort to understand, and then harness for antisubordination effect, sameness/difference issues with contemporary sociolegal significance.

4. The fourth level of multidimensionality, like the third, attends to inter-group issues. This level is a focus on connecting and/or contrasting Queer legal theory to other genres of scholarship, and, in particular, the various strands of outsider jurisprudence (critical race theory, feminist legal theory, LatCrit theory) that critique race/ethnicity, class, sex/gender and other categories of social-legal identities and relations. This effort progressively can lead to expanding engagements with other jurisprudential developments and communities that similarly are congruent with social justice transformation.[178] This effort, in time, can help to reveal the characteristics not only of outgroup histories and positions, it also can help to reveal the strengths and shortcomings of pre/existing discourses that help to construct those groups in contemporary law and

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SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE & TIMES OF HARVEY MILK (1982) (exploring the development of the Castro District through an examination of the life and death of its unofficial mayor, Harvey Milk). In the wake of Matt's murder, and in contrast to it, media reports also suggest how regional and geographic considerations may affect antisubordination analyses of sociolegal issues. For instance, within weeks of Matt's murder the media was reporting that "changing European attitudes toward homosexuality" in recent years had produced the enactment of "laws prohibiting discrimination against gays and lesbians" as well as laws recognizing the legitimacy of same-sex unions. *See* Carla Power, *Now It's the Gay Nineties?*, NEWSWEEK, Nov. 23, 1998, at 35, 35. These kinds of laws do not yet exist in this country because they are still viciously, and successfully, opposed by majoritarian cultural warriors. *See supra* Parts D, E. Of course, geography, like all else can provide only a partial and shifting lens into sociolegal issues. For instance, only a few years ago the media also was reporting that small-town America slowly but surely was enlightening itself on sexual orientation issues. *See, e.g.*, Debra Rosenberg, *Homophobia*, NEWSWEEK, Feb. 14, 1994, at 42. The point, therefore, is that geography, as *one* level of multidimensionality can help critical scholars to excavate structures of subordination for more comprehensive, and comparative, analyses.

177. *See supra* notes 53–66 and accompanying text.

178. For instance, discourses on dis/ability and law, and on therapeutic jurisprudence, are likely candidates for engagement. *See generally* THE DISABILITY STUDIES READER (Lennard J. Davis ed., 1997) (discussing disability theory in a manner similar to the way race, gender and class have been theorized); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (1996) (suggesting that law can be seen to function as a kind of therapeutic agent).

society. This level of multidimensionality thus turns the focus inward, urging all scholars to consider not only inter-group issues, but to articulate each project consciously in the context of varied, and perhaps paralleling, multilateral discourses.

In tandem, these four levels of multidimensional analysis represent a scholarly commitment to a continual and balanced "rotation of centers" that permits a social justice discourse both to focus on particularity as well as to induce knowledge that is part of a larger mosaic.[179] This rotation, as noted above, values both specificity and generality, and values most their synthesis and balance as antisubordination method. This multidimensionalized rotation of centers is designed to balance over time the need for both micro- and macro- analyses of subordination in order to allow critical understanding both of particularity in specific contexts as well as of the patterns created through the accumulation of particularities across specific, but perhaps recurrent, sociolegal arrangements. This rotation thus represents a commitment to mapping both the continuities and discontinuities of intra- and inter-group positions across various social and doctrinal domains, but always vis-à-vis egalitarian social justice goals that can be advanced through law and legal reform.

Of course, not every project need operate on all four levels of multidimensionality at once. Given the need for focus and the limitations of time and space, it is unclear whether doing so is warranted, much less feasible. However, every social justice scholar consciously should consider the propriety of doing so in light of the circumstances and conditions that define these times. To do so, scholars will need to weigh factors like the context and mission of each project, as well as the relationship of different identity constructs to a particular project's focus, context and mission. The conscious decisions about multidimensional scope and reach that each scholar then makes for every project should help both to inform carefully, and to qualify explicitly, the parameters of each project as a form of social justice intervention.[180]

Over time, the net result of the scholarly practices suggested by these four levels should be a jurisprudential culture of enhanced awareness of the multidimensional issues implicated by every project and every discourse, even if not all such implications actually are engaged in a particular project. This net result is possible because these four levels of multidimensional analysis are transportable across fields of law and life, and thereby can serve as a basic framework for the construction of Queer and allied discourses organized around egalitarian fidelity to antisubordination purpose, both internally and externally. These four levels can be applied to social or doctrinal issues that, like sexual orientation

179. *See* Valdes, *supra* note 51; *see also supra* notes 162–66.

180. *See generally* Valdes, *supra* note 26, at 1326–28 (noting that minority theorists must articulate the position from which they "conceive and articulate" their analysis ).

scholarship, range from constitutional to family law.[181] As a set, these four levels of multidimensionality, and perhaps others, can serve as a template for critical antisubordination analysis that is adjustable and applicable to variegated social or doctrinal contexts and that can advance outgroup interests in law and lawmaking contexts.

Fortunately, the twin symposia of 1997 jointly place us at the cusp of realizing this linkage specifically in the context of sexual orientation legal scholarship. These symposia project an unrelaxed concern for sexual orientation and homophobia.[182] Yet, they also signal a newfound concern for the interaction—or intersexion—of sexual orientation and other aspects of gay and lesbian interests,[183] which may help multiply diverse sexual minorities to begin coalescing more effectively with racial/ethnic, sex/gender and other outgroups to mount counter-majoritarian interventions. These symposia set an example that amounts to a challenge for, and ideally a beginning of, a multidimensional sexual orientation scholarship.

### J. *Internalization & Self-Critical Awareness in Antisubordination Projects*

Practicing multidimensionality and strategic quasi-essentialism to balance diversity and solidarity in a majoritarian society may help legal scholars to galvanize social justice projects and discourses, but those efforts are not enough to sustain a long-term antisubordination struggle. As the Queer credo from above notes, appreciating and rejecting self-hatred is a key component of effective antisubordination struggle.[184] It must be similarly so for scholarship that seeks to advance antisubordination goals: not only must Queer and allied scholars refrain from assuming essentialist antisubordination affinity based on a commonality of disfavored identities, we also must refrain from assuming that experience with disfavored identity immunizes us from replicating essentialized identity-related biases. Rather, the sort of Queer, multidimensional scholarship envisioned here, and facilitated by this symposium and its counterpart, necessarily entails a firm resolution to spot and excise the operation of internal(ized) biases and essentialisms within our communities and ourselves. A threshold precaution therefore rises against the allowance or trivialization of essentialist prejudice in our midst, especially when it might serve to privilege us.

Social justice integrity requires self-awareness and self-critique because antisubordination scholars must resist social injustice both exter-

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181. *See supra* note 27 and accompanying text.

182. Without doubt, every article published in this symposium exudes a strong concern for sexual orientation justice.

183. In particular, the arguments advanced by Boyd, *supra* note 140, Cain, *supra* note 66, Ertman, *supra* note 61, and Franke *supra* note 53, pursue analyses that signal a multidimensional expansion of "sexual orientation" and justice.

184. *See supra* note 56 and accompanying text.

nally and internally.[185] We must avoid deploying existing or new structures of subordination; we must interrogate our possible redeployment of prejudice and privilege, including but not limited to situational redeployments that entail self-hate.[186] This proactive commitment to self-critical rejection of internal(ized) essentialist bigotry is a predicate for multidimensional analysis because internalized homophobia, racism, sexism and other forms of domination that depend on essentialized identities can blind our work to the ways in which these forces may hold sway over us. If we indulge injustices that we should cognize, we occlude in our minds the patterns of oppression that interconnect the social realities that we inhabit. Blinded, we may become unconsciously complicit in their operation within our immediate surroundings. We thereby disable our critical ability to practice multidimensionality effectively. In time we may bring into question the integrity of our antisubordination principles and practices.

By licensing through ignorance or laziness the operation of biases in ourselves and our midst, we sabotage our capacity for multidimensional analysis as a means toward critical coalitions with the potential to make a transformative difference in the lives of multiply diverse sexual minorities. Consequently, to make the move from single-axis sexual orientation scholarship to multidimensional Queer critiques of subordination, we must investigate and resist the operation of Euro-heteropatriarchal biases not only throughout the United States and beyond, *but within our communities and selves*.[187] This effort, in turn, requires acknowledgement of legal scholarship's place and power in this society, and of the responsibility that antisubordination legal scholars thereby cannot avert.

### K. *Politics, Scholarship & Responsibility in Social Justice Struggle*

Because material transformation through just laws and lawmaking is the purpose of antisubordination legal scholarship, substantive social justice in the everyday life of a multicultural nation is the measure of our work's success:[188] being conscious of purpose, antisubordination scholarship on sexual orientation or other identity categories cannot be oblivious to effect.[189] For critical legal scholarship on sexual orientation to be rele-

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185. *See* Margaret E. Montoya, *Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis*, 2 HARV. LATINO L. REV. 349, 351 (1997) (arguing that LatCrit academic discourse should include self-critique).

186. *See* Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 HARV. LATINO L. REV. 495, 495, 499 (1997) (arguing that greater understanding of intergroup prejudice is a necessary precursor to developing an interracial jurisprudence).

187. *See* Iglesias & Valdes, *supra* note 162, at 1138, 1141–42.

188. *See* Lawrence, *supra* note 17, at 847 (suggesting the promise of antisubordination scholarship lies in the possibility of renewing the vision of America as a nation strengthened by its diversity and of "American life as a struggle for inclusion and belonging").

189. *See, e.g.*, Sumi K. Cho, *Essential Politics*, 2 HARV. LATINO L. REV. 433, 455 (1997) (arguing that scholars should assess the "political impact" of our work); Culp, *supra* note 155, at 482

vant in the lives of multiply diverse sexual minorities, our work therefore must be not only responsive to the material conditions of oppression that shape Queer life, but also must be causative in a majoritarian lawmaking order. Thus, even though progress may be incremental and even ephemeral—secured, if at all, in fragments—the fundamental question for antisubordination legal scholars always is whether our work consciously gauges the social justice effects that it can, or may help to, materialize.

To be purposeful and effective, the scholarship begun in these twin symposia must not shy away from political consciousness and social responsibility. Although multiply diverse antisubordination scholars may arrive at varied views on any particular point—and even on fundamental proposals—we always should be alert to the politics and effects of legal scholarship. This vigilance is especially valuable when our work is conceived and received as part of a continuing struggle for social justice. We must, in short, accept responsibility for the purpose *and* effects of our scholarship—even though social justice purpose in legal scholarship sometimes is viewed, especially (but not surprisingly) among majoritarian circles—as being inherently at odds with scholarly investigation.

According to that view, the "political" can never be the "scholarly" because the former is partisan and the latter objective.[190] Under that view, the scholar remains superficially oblivious to, and effectively never responsible for, the society that her work helps to conceive, conduce, justify and consolidate. It is a view that legitimates "scholarly" disclaimers of responsibility and fosters a smug sense of academic immunity from social accountability.

It also is a view with historical and renewed resonance, as the record of critical race theory has shown in recent years: exhibiting a sharp political awareness since its founding, critical race theory has been smeared by those among the already-privileged who cling to the convenient notion that scholarly dedication aimed toward social justice can be devalued to a mere subjectivity, while scholarly detachment that hovers above social injustice can be elevated to a grand objectivity.[191] Such attacks

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(stressing that outsider scholars must work together to imagine reforms that avoid replication of hierarchy).

190. This topic of course touches on the question of "objectivity" or "neutrality" in legal culture, which has a long and contentious history that is beyond the scope of this Afterword. *See generally* Valdes, *supra* note 3, at 126 n.333 (listing sources that deal with impartiality and neutrality in legal principles). The limited point advanced here is that legal scholarship, in particular, has political impact, and that this impact cannot be denied by simple disavowal or complacent detachment. The inevitability of impact has prompted one social justice scholar to call for "political impact determinations" in antisubordination legal scholarship. Cho, *supra* note 189, at 434.

191. This attack has focused chiefly on the use of narrative in critical race theory, which is decried by some uncritical or mainstream observers as a lesser method of scholarship in part because it is viewed by them as less "objective" or "neutral" in its recounting of social or legal experience than traditional preferences would permit. *See generally* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993) (conceding

hinge and insist on a peevish formulation of "scholarship" that, as applied to the field of law in a legalistic society, is unconscionable: in a society where law is promised to justice, and where society maintains itself through the use of law while professing its justice, the study of law cannot long pretend detachment from the project of social justice through law. In a society that denominates majoritarian and "democratic" lawmaking as the only definitive formal mechanism for processing conflicts over "competing" values or interests, the study of law cannot avoid implication in the social and material consequences that law produces through its decisive, if not definitive, participation in such conflicts.[192] The political power and social responsibility of *all* legal scholarship, though sometimes still denied from above, really is beyond credible doubt.

Indeed, the existence and maintenance of a prestigious and comfortable legal academy is a patent and longstanding recognition that our work—including our scholarship—does matter. Our work, and especially our scholarship, matters because it helps, first, to create and disseminate conceptual frameworks for understanding social phenomena, and, then, to influence the formulation of public policy and legal regimes that, for better or worse, respond to and help to re/shape such phenomena. Our work matters because, incrementally but cumulatively, it helps to construct the social and material reality of this nation. Thus, there is no such thing as "scholarly" detachment. There is only social responsibility.

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that storytelling can contribute to legal scholarship, but insisting that the stories must be accurate and typical and should include an analytic dimension); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1749 (1989) (arguing that minority scholars "fail to support persuasively their claims of racial exclusion or . . . [that they] produce a racially distinctive brand of valuable scholarship"). These attacks have inspired spirited responses from scholars identified with critical race theory, feminist legal theory, critical race feminism, and Queer legal theory. *See, e.g.*, Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 256 (1994) (defending storytelling against the "sudden, and rather vehement, resistance" to its effectiveness and use); Colloquy, *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990) (setting forth critical and other views); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 543 (1991) (discussing the use of autobiography by blacks in law teaching to illuminate both scholarship and racial justice); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 111 (1990) (noting criticisms of outsider scholarship and scholarship itself, and weighing how to help society deal with its racial problems); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1846 (1994) (discussing how credibility concerns about the storyteller can be misplaced in outsider narratives); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 809 (1994). These responses likewise have elicited further replies from the skeptics. *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647, 650 (1994) (expressing concern over a perceived tendency to subject "objective" legal scholarship to the demands of politics which will advance only the interests or perspectives of a particular community).

192. *See supra* notes 100–38 and accompanying text.

Of course, this defense of social relevance and responsibility is neither a call nor an excuse for scholarly sloppiness in legal discourse.[193] Relevance and responsibility do not entail any acquiescence to a less rigorous production of socially relevant legal knowledge; this point has been made by the impressive record of outsider or perspective jurisprudence produced to date.[194] Indeed, sloppy legal scholarship can result from complacent social insulation as much as from fierce social commitment. This call for critical consciousness about purpose and effect also does not invite conformist agreement among outgroup approaches to social justice. Conformity, like sloppiness, can come from many sources.[195]

Instead, scholarly acknowledgment and acceptance of responsibility for the social effects of legal scholarship merely—but crucially—shifts the values and paradigms for the production of scholarship. This shift tilts the enterprise toward a greater concern for, and involvement with, social justice through lawmaking.[196] It is a shift amply counseled for legal scholars by the centrality of law to substantive social reformation within this legalistic society.[197] It is a shift made imperative by the majoritarian campaigns of today's cultural war, which focuses on lawmaking processes to reclaim and re-impose traditionalist cultural superiority as a matter of formal law.[198]

Thus, by looking the other way—by seeking to ignore the foreseeable effects of our disengagement with the everyday lives of those whom the law slights—legal scholars effectively take sides with the privileged

193. On the contrary, outsider status counsels self-critical awareness among antisubordination legal theorists. *See* Iglesias & Valdes, *supra* note 162, at 583.

194. This record includes the gains since 1979 of sexual orientation legal scholarship as well as the gains of other outsider discourses, including feminist legal theory, critical race theory and LatCrit theory. *See supra* notes 25–27 and 35–52 and accompanying text; *see also* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 11–12 (1995) (noting the evolution of new "perspective" scholarship that is built on the study of relevant differences among people).

195. Additionally, there is nothing inherently incompatible between antisubordination purpose and legal scholarship in a heterogeneous society formally and emphatically devoted to social justice and harmony through law. *See supra* note 11 and accompanying text. On the contrary, in such a society it would seem that critical fidelity to basic legal principles and national ideals would be a beneficial characteristic of legal scholarship. Moreover, this benefit would increase if the legal principles or national ideals in question had been formalized as a matter of law yet remained aspirational as a social matter—in this case, the legal scholar could, and should, aid the nation in operationalizing, thereby realizing the integrity of, its professed principles and ideals. *See generally supra* note 150 and sources cited therein. Because these conditions describe the American status quo, legal scholarship with antisubordination consciousness and conscience is not only a legitimate and valuable discursive enterprise, it is a compelling social need. *See generally supra* notes 154–61 and sources cited therein.

196. *See generally* Culp, *supra* note 191, at 546–47 (explaining how personal identity may connect group experiences with the law study); Lawrence, *supra* note 23 (theorizing how antisubordination purpose and method are interwoven in teaching, scholarship and community).

197. *See supra* Part B.

198. *See supra* Parts D, E.

and powerful who prefer to sustain a status quo that favors them at the expense of others.[199] In the current context of cultural war, this election may comport to majoritarian self-interest, but not to antisubordination purpose. By "letting the chips fall where *they* may," rather than by noting where and how *we* choose to throw *our* chips, legal scholars may seek to disavow the ripple effects that we (should) know our work generates. But by acknowledging the political nature and effects of our work, legal scholars self-consciously and self-critically assume responsibility for the causative power that our positions of (limited but significant) influence accord to us as members of this nation's privileged legal academy. By joining antisubordination purpose with multidimensional analysis, the nascent field of Queer legal theory heralded by the two intersexionality symposia of 1997 can help to ensure that public discourse and legal reforms on "sexual orientation" will be socially grounded, socially relevant and socially responsible.

## CONCLUSION

Now, and the next several years, are a critical time for sexual orientation legal scholars. Through our combined work we can show ourselves able to develop the kind of multidimensional, antisubordination legal discourse on sexual orientation that this symposium and its counterpart invite. Doing so will require us to expand our intellectual and political horizons. Not doing so will hamper our social justice efforts, qualifying both the equality principles that we profess to uphold, and the transformative aims that we seek to advance, through our work. For me—as for the authors and editors of this symposium and its counterpart—the better choice seems clear.

It thus is a happy coincidence that in 1997 not one, but two, unprecedented symposia on sexual orientation and intersectionality—or "intersexionality"—were conceived and planned independently of each other by the editors and advisors of two law reviews. By framing the symposia in this manner, the *Denver University Law Review*[200] and its counterpart in this serendipity, the *Hastings Law Review*,[201] have marked 1997 as the

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199. This "passive" partisanship, buttressing ingroup domination of law and society, is precisely the pose of formal, official impartiality urged by majoritarian warriors that espouse ingroup prerogatives through backlash lawmaking: "I think it no business of the courts . . . to take sides in this culture war," dissented Justice Scalia in *Romer v. Evans*. 517 U.S. 620, 636 (Scalia, J. dissenting); *see supra* notes 104, 131 (discussing the decision in *Romer*). Though this pose failed in *Romer*, it succeeded in *Bowers*. *See supra* note 14 (discussing the decision in *Bowers*). In these two instances, this pose has been urged directly for "objective" judges, but it dovetails and helps to legitimate the notion that "true" legal scholars are those who rise "objectively" above the ugliness of cultural war. In both instances, it seems to me, a key flaw (or, for ingroup elites, virtue) of this urging is that this pose relies on the assumption that the law and society produced via cultural warfare are segregatable from that phenomenon.

200. Symposium, *InterSEXionality*, *supra* note 4.

201. Symposium, *Intersexions*, *supra* note 4.

year in which sexual orientation scholarship entered the postmodern age in a programmatic, if only tentative, way.

Of course, we cannot tell now where these symposia ultimately will lead. Nor can we tell whether our scholarship ever will be enough to counter the sweep of majoritarian essentialism and cultural backlash. But hopefully, the coincidence of the two 1997 symposia is a harbinger of a coming expansion in the scope, depth and power of sexual orientation legal scholarship as a form of social justice practice; hopefully, one day a future generation of legal scholars will look back on this year, and on these symposia, as the commencement of a second, more expansive and enduring, wave of legal scholarship on sexual orientation. To help hasten that day's arrival, this Afterword urges today's legal scholars to become cultural warriors by adopting and extending in sexual orientation discourse the techniques and tools of multidimensional analysis and praxis.